CALIFORNIA, MARYLAND TAKE AIM AT SMOKERS — PAGES 12-13

Environment & Climate News

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Chief says Forest Service suffers from "analysis paralysis"

Bosworth wants new regulations, not more "collaborative planning"

BY RANDAL O'TOOLE

The U.S. Forest Service is in gridlock due to "analysis paralysis," says Chief Dale Bosworth, who wants to solve the problem by streamlining the agency's decision-making process through new regulations.

Bosworth testified on December 4 before the Subcommittee on Forests and Forest Health of the House Committee on Resources, in a hearing on "Gridlock on the National Forests."

In his introduction to the hearing, Subcommittee Chair Scott McInnis referred to "conflicting laws and regulations" that "create a vicious cycle of confusion and conflict on the ground." Bosworth, however, said he did not think the laws and regulations were in conflict as much as simply not workable. They have resulted in "difficult, costly, confusing, and seemingly endless processes" needed to make decisions.

As an example, Bosworth described a fire in Montana that burned state lands and national forests in 2000. The state has already salvaged 22 million board feet of fire-killed and damaged trees. The Forest Service, however, has yet to salvage a single tree because the environmental impact statement process takes so long.

Former Forest Service Chief Jack Ward Thomas took a broader and harsher view at the same hearing. The forest planning process, he said, is "seriously flawed in

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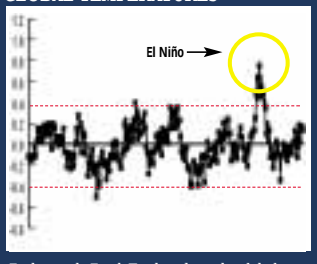
Is *this* global warming?

GLOBAL TEMPERATURES



Each month, *Earth Track* updates the global averaged monthly satellite measurements of the Earth's temperature. *See page 3*

Daschle thwarts ANWR vote, unveils own proposal

"Don't want a vote on ANWR because they know they would lose," explains Senator from Alaska

BY JAMES M. TAYLOR

Senate Majority Leader Tom Daschle (D-South Dakota) successfully thwarted efforts for the full Senate to vote on an energy plan before the year 2001 came to an end. Daschle ignored pressure from a coalition of Teamsters, labor-friendly Democrats, and Senate Republicans to allow a floor vote after a coalition-supported bill cleared the Democrat-controlled Senate Energy Committee.

Daschle scuttled the coalition bill because, as part of an attempt to strike a balance between increasing energy production and greater conservation incentives, it would allow natural resource recovery in a small portion of the Arctic National Wildlife Refuge (ANWR). Many Senate Democrats who would normally be expected to vote with the environmental lobby against ANWR are poised to vote for a limited amount of natural resource recovery in light of the nation's growing energy needs and the substantial number of jobs that would be created by the plan.

Republicans fail to attach to railroad bill

With Daschle preventing a stand-alone vote on the coalition energy bill, Senate Republicans unsuccessfully attempted to attach the bill to other Daschle-favored legislation prior to the Senate's Christmas adjournment.

The Republican leadership sought to attach the energy bill and a bill banning human cloning to a measure that would allow the railroad industry's pension fund to be invested in the stock market and government bonds. However, the strategy backfired when some proponents of the energy bill refused to support a bill that included the

DASCHLE continued on page 11

The Alaska Pipeline at sunset. Experts agree that drilling in the Arctic National Wildlife Refuge would present few, if any, environmental risks. photo/www.anwr.org

Appeals court limits prior owners' Superfund liability

BY KENNETH A. EHRLICH

In a long-awaited decision, the United States Court of Appeals for the Ninth Circuit substantially limited liability for most prior landowners from Superfund liability. *Carson Harbor Village v. Unocal Corp.*, ___ F.3d. ___, 2001 DJDAR 11365 (9th Cir., Oct. 25, 2001).

Summary of decision

The recent decision, rendered by an 11-judge panel, represents a stark turnaround from the court's September 2000 decision in the same case (then decided by a three-judge panel).

The court's earlier ruling determined that:

(1) a private party can be liable under the federal Superfund law (CERCLA) for cleanup costs regardless of whether a public agency required the party seeking recovery to incur those costs; and

(2) under CERCLA, "passive" migration of hazardous wastes constitutes an actionable disposal of contaminants. *Carson Harbor Village v. Unocal Corp.*, No. 98-55056 (9th Cir., Sept. 14, 2000).

This most recent, and likely final, ruling from the Ninth Circuit panel holds:

(1) identical to the court's prior ruling, an agency action is not a prerequisite for a finding of "necessity" under Superfund cleanup guidelines (the National Contingency Plan); and

(2) prior landowners are not liable under CERCLA where only "passive" migration of contamination occurs during their ownership period. In the *Carson Harbor* matter, the subject contamination was deposited prior to the target defendants' purchase of the site and dis-

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Time for EPA to clean up StarLink mess

BY DAVID ERICKSON

The controversial StarLink bioengineered corn, which found its way into the human food supply even though it was approved only for animal feed, is on its way out, and good riddance. But an important question remains: Will StarLink take farmers and food processors with it?

The Environmental Protection Agency, which messed up big time in granting a feed-only approval, now has enough data to give human foods containing Starlink legal status. If the agency would approve trace levels in human food, farmers could sell their grain without worrying about whether it contained traces of StarLink. Food companies would not have to issue recalls every time some activist group tested a taco chip for unapproved proteins, and the whole country could move on.

A science advisory panel has told EPA it does not have enough evidence to say with certainty whether low levels of StarLink could cause allergies. But we know enough already to say that low levels of StarLink pose little risk to human health.

By contrast, we know that traces of unapproved StarLink pose a major risk to farmers' markets and food processors' businesses. It's time to grant a tolerance for trace levels in corn products until all StarLink can be cleared out of the system.

The Centers for Disease Control and Prevention has concluded that no one reporting allergic reactions to StarLink corn showed evidence of such a reaction in his or her blood. There was good reason for that—none of the food samples the people blamed for their allergic reactions showed any presence of StarLink. In fact, for all the headlines, activist positioning, product recalls, and loss of markets, no illness has been linked to StarLink after nearly a year. Now that StarLink has been pulled from the market, levels in food will decrease until all traces are gone.

Multi-million dollar fiasco

It all started in September 2000, when a consumer group tested some taco shells and found a small amount of protein from StarLink corn, developed to ward off insects without the use of chemical insecticides. However, because StarLink was not immediately broken down in digestion studies the way non-allergenic proteins are, EPA wanted more data before approving it for human food uses.

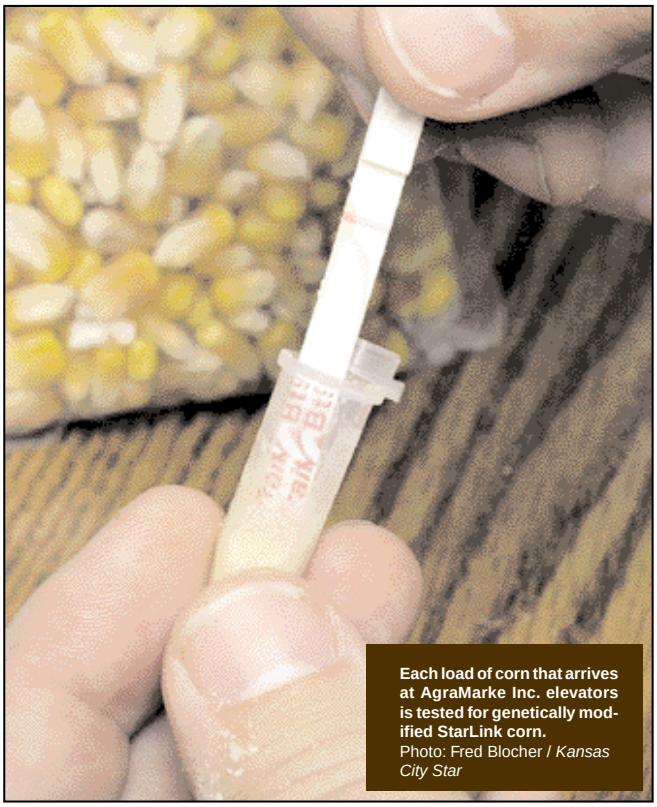
Some of the grain that should have been segregated for animal food got mixed with other grain, and StarLink protein ended up in tacos and many other corn products.

Some of the country's leading allergy experts went on record saying there was very little risk StarLink would cause any harm. They explained people develop allergies only after continued exposure to relatively high levels of allergy-causing proteins. Given the very low levels of StarLink in processed foods, there was little chance of people developing the antigens that lead to allergic reactions. Studies have shown the StarLink protein did not resemble known allergens, so it probably isn't an allergen anyway.

All of that was good reason to maintain calm when the story broke.

Of course, that's not what happened. The entire food-scare playbook was used, from alleged victims to press conferences to headlines to recalls to embargoes. A multi-million-dollar fiasco ensued.

But who gets the blame?



Each load of corn that arrives at AgraMarke Inc. elevators is tested for genetically modified StarLink corn.
Photo: Fred Blocher / *Kansas City Star*

Enough blame to go around

It starts with EPA and Aventis, the developer of StarLink. Both were naive to believe all the StarLink corn would go for animal feed uses. By proceeding with the half-registration of StarLink, they risked undermining public confidence in the regulatory system while increasing public concern over biotechnology.

Anti-biotechnology groups saw an opportunity and exploited it. They implied the regulatory system was broken. They willingly overstated the possible risk of low-level exposure to the StarLink protein and looked for additional products with traces of StarLink.

"It's time to grant a tolerance for trace levels in corn products until all StarLink can be cleared out of the system."

The news media played the StarLink story for its full headline value. Most abandoned their responsibility to fully explain the science and provide perspective on risk.

And now scientists may refuse to let common sense put this issue to rest. There is no evidence StarLink causes allergies, but scientists want the impossible: They want to see proof it won't.

The only good to come from this fiasco is that the biotech industry and EPA learned a very painful lesson, and both have sworn off split registrations. So we can be assured no more biotech crops will be approved without full food clearance. That will strengthen an already rigorous regulatory process.

EPA ought to thank the advisory panel for its time, weigh the risks to health and commerce, and then make the right decision. It is time to clean up the mess EPA and Aventis caused—not to forgive Aventis for its foul-up, but to get this phony food scare off the backs of farmers and food processors so we can get on with our business.

David Erickson produces corn and soybeans on his farm near Altona, Illinois. He is past president and past chairman of the board of the American Soybean Association.

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Desalinization plant splits environmentalists in central Florida

BY JAMES M. TAYLOR

For most of the past several years, central Florida has been battling a prolonged drought. With rainfall scarce and water needs growing, freshwater wells have been drying up, lakes and ponds have been transformed to swamps and grasslands, and the Florida underground aquifer has receded further and further from the surface.

As environmentalists have grown increasingly vocal in demanding that something be done, local government has responded. However, in meeting the demands of one particular environmental lobby, local government has incurred the wrath of another.

The solution that has drawn the wrath of a new group of environmentalists is one that holds the promise of creating a near limitless supply of fresh water without the slightest adverse effect on wells, lakes, ponds, streams, and the Florida aquifer. Tampa Bay Water, a local government agency that provides wholesale water to several cities and counties in the Tampa Bay area, has proposed to build a desalinization plant on the shore of Tampa Bay next year, with at least one more plant to be built along the Gulf of Mexico later this decade.

Desalinization well-suited for central Florida

Desalinization technology is not new. However, market factors have generally made desalinization plants overly costly. Freshwater sources are relatively abundant in the Western Hemisphere, and local governments invariably subsidize the extraction of water from nearby lakes, rivers, and aquifers. The world's largest and most widespread desalinization plants exist in Saudi Arabia and other parts of the Middle East, where potable water is much scarcer.

The proposed Tampa Bay desalinization plant would be the largest such plant in the Western Hemisphere. To create potable water, the plant would take in 44 million gallons of saltwater per day from Tampa Bay. The saltwater would be pumped under great pressure through special membranes that would extract the salt and other minerals from the water.

Of the 44 million gallons taken in each day, 25 million gallons would be converted to potable water, while the remaining 19 million gallons would absorb the combined salt extract. This 19 million gallons of briny, double-salt water would be diluted with 1.4 billion gallons of water discharged every day from the Tampa Electric Company's Big Bend power plant.

The end result would raise the salinity of the power plant discharge water from 26.0 parts per thousand, which is consistent with the overall salinity of Tampa Bay, to 26.3 parts per thousand.

"Desalinated seawater is a drought-proof, alternative water supply that can be produced in an environmentally and economically sound manner," states the Tampa Bay Water position statement.

The Tampa Bay Water proposal makes sense to local government officials. Desalinization technologies have advanced to the point that converting saltwater to freshwater is not substantially more expensive than extracting potable water from nearby rivers and the Florida aquifer. Moreover, government officials have become increasingly sensitive to the calls of local environmentalists to alleviate the effects of periodic droughts.

For a few extra pennies on the dollar, government officials crafted a solution that would provide freshwater without harming the region's lakes, ponds, rivers, and wells.

Saltwater environmentalists challenge plant

However, just as local officials acted to please one group of environmentalists, a new group has emerged to challenge the desalinization plant.

A group called Save Our Bays Air and Canals (SOBAC) formed for the sole purpose of blocking the proposed desalinization facility. According to SOBAC, Tampa Bay is a fragile marine estuary that may not be able to handle the desalinization plant's briny discharge.

"It is believed that the flushing of Tampa Bay is too slow and salt build-up will occur, resulting in the destruction of sensitive marine and wetland habitats. It is our opinion that this facility should be built on the Gulf of Mexico where better mixing of the salty water can be achieved," states the group's position summary.

"Desalinated seawater is a drought-proof, alternative water supply that can be produced in an environmentally and economically sound manner."

TAMPA BAY WATER

Additionally, SOBAC protests that small marine organisms will not be protected from being sucked into the desalinization chamber.

"The intake screens are not the best available technology and are only required from March 15th -October 15th. The rest of the year marine organisms will be killed as they are sucked into the intake," states the SOBAC summary.

Opponents of the plant suggest that a better alternative, if a desalinization plant must be built, would be to locate the plant in nearby Pinellas County, directly astride the Gulf of Mexico.

"I am rather firm that it ought to be on the other side of the Bay," in Pinellas County, said Hillsborough County Environmental Protection Commission executive director Roger Stewart. "They are in open saltwater over there. Why put it in an estuary?"

Alternatively, opponents seek to have the plant extend its intake and discharge pipes several miles out into the Gulf of Mexico. "Tampa Bay is too sensitive," explained Sierra Club organizer Beth Connor.

Economics point to Tampa Bay plant first

Locating the plant in Pinellas County may sound like a good idea on the surface, argue plant supporters, but it would cost much more money to do so, jeopardizing the economic feasibility of the project. Without an economically feasible desalinization plant, the status quo strains on Florida's freshwater ecosystems would continue.

"The kind of changes in salinity we're talking about, these creatures encounter on an hourly basis," said Robin Lewis, president of Lewis Environmental Services.

"Creatures that live in the Bay are used to changes in salinity of 3.0 to 5.0 parts per thousand a day," Lewis said, contrasted with the 0.3 parts per thousand increase that would result from the Tampa Bay Water proposal. Even the most salinesensitive organisms can tolerate changes far greater than the brine will cause, he said.

Although Tampa Bay Water officials are likely to support an additional plant in Pinellas County later in the decade, they say they will not budge from their insistence that the Hillsborough County plant be built first.

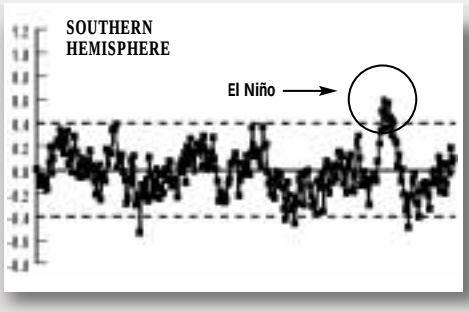
EARTH TRACK

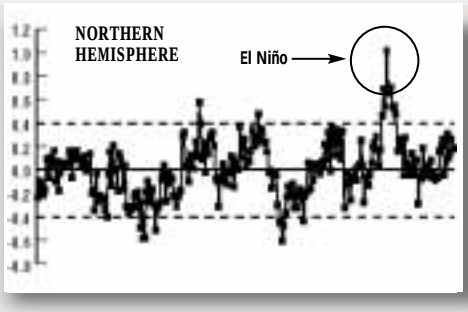
DECEMBER 2001

The global average temperature for December, shown on page 1, was 0.14˚C above normal. The Southern Hemisphere's temperature departure, shown below, was 0.09˚C above normal; the Northern Hemisphere's, below right, was 0.18˚C above normal.

Each month, Earth Track *updates the global averaged monthly satellite measurements of the Earth's temperature. These numbers are important because they are real—not projections, forecasts, or guesses.*

Global satellite measurements are made from a series of orbiting platforms that sense the average temperature in various atmospheric layers. Here, we present the lowest level, which climate models say should be warming. The satellite measurements are considered accurate to within 0.01°C.





The data used to create these graphs can be found on the Internet at *http://vortex.nsstc.uah.edu/data/msu/t2lt/t2ltglhmam.d.*

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GAO, Nevada officials battle Yucca Mountain plan

Workers watch as a Department of Energy tunnel-boring machine emerges from a 25-foot-diameter, 5-mile-long horseshoe-shaped tunnel through Yucca Mountain at the Nevada Test Site. Data collected at the tunnel will help determine whether the mountain is a suitable site for the disposal of high-level nuclear waste. Photo: John Gurzinski

BY JAMES M. TAYLOR

The General Accounting Office (GAO) and Nevada state officials are mounting new challenges to the Bush administration's plan to designate Yucca Mountain as permanent home for the nation's spent nuclear fuel.

Leaked report calls plan premature

A GAO draft report regarding the Yucca Mountain storage plan was leaked to the media on November 30. According to the GAO, the Bush administration would be premature to designate Yucca Mountain as the storage site for the nation's nuclear waste.

The report asserted the Department of Energy (DOE) is still gathering and analyzing data on nearly 300 issues of concern, including the expected lifetime of manmade radiation barriers, the physical properties of Yucca Mountain itself, and the mathematical models used to evaluate the project's planned performance.

"Yucca Mountain proponents countered that the important issues have already been researched and resolved, and that it would be unnecessary and irresponsible to further delay the project until every minor detail is resolved."

Energy Secretary Spencer Abraham is expected in early 2002 to formally recommend to President George W. Bush that Yucca Mountain be designated the permanent storage site for the nation's nuclear waste.

The project is already significantly behind schedule, as legal and scientific challenges have hampered the search for a permanent nuclear waste storage site since Congress first authorized the search for such a site in 1982. According to the 1982 legislation, the Energy Department was supposed to begin accepting nuclear waste from various utility companies in 1998.

By formally recommending the Yucca Mountain site this winter, Abraham was hoping to make the facility operational by 2010. According to the GAO, however, the administration should not even begin thinking about a formal recommendation until all outstanding questions have been resolved, likely around four years from now.

"DOE is not ready to make a site recommendation because it does not yet have all of the technical information needed for a recommendation and a subsequent license application," stated the GAO report.

Yucca Mountain proponents countered that the important issues have already been researched and resolved, and that it would be unnecessary and irresponsible to further delay the project until every minor detail is resolved.

In June 2001, the Environmental Protection Agency announced tougher new standards the administration would impose regarding low-level radiation leakage. Following that announcement, the DOE in August 2001 gave a favorable safety assessment of the Yucca Mountain facility even with respect to the tougher new standards. Proponents noted most of the outstanding issues cited by the GAO are relatively minor as compared to the primary issues already researched and resolved.

"GAO appears to be lumping all decision-making into one process, and that's not the way it works," said Nuclear Energy Institute Vice President Scott Peterson. "I don't think the GAO report will have a major impact" on the Bush administration's deliberations, he added.

GAO, administration disagree

The draft report, and the manner in which it was leaked to the press, raised eyebrows in light of the GAO's ongoing battles with the Bush administration.

Last summer, the GAO threatened to sue the administration after Vice President Dick Cheney refused to hand over records relating to the administration's formulation of its national energy policy. The clash was put on hold in the aftermath of the September 11 terrorist attacks, but the bad blood remains. The fact that the Yucca Mountain plan is intricately tied to the administration's energy policy was not lost on administration observers.

"While I have great respect for GAO, this kind of premature disclosure significantly, if not irreversibly, taints the work product of any inquiry by GAO or any other investigative body," said Abraham. "This is especially disturbing in that the draft report is fatally flawed."

Nevada challenges Energy Department

In a separate development, Nevada's director of nuclear affairs announced the state plans to file a lawsuit challenging recently amended rules regarding Yucca Mountain.

The Energy Department changed its safety assessment rules, becoming effective December 14, to allow the Department to meet EPA's tough new safety requirements through a combination of natural and man-made barriers. Prior to the Energy Department's December 14 rules, the DOE was committed to demonstrating that nature alone could provide the necessary barriers to meet EPA's requirements.

Nevada officials, who have consistently opposed the designation of any nuclear storage facility in their state, argued that when Congress in 1982 authorized the search for a permanent nuclear waste storage facility, it explicitly contemplated that geological features alone must be sufficient to prevent radiation leakage.

"The notion that geological features must be the primary form of containment is . . . explicitly required" by the 1982 legislation, argued Nevada Governor Kenny Guinn. Guinn further asserted that under the DOE's new rules, an allegedly viable storage site could be constructed "on the shores of Lake Tahoe" or in a Washington DC federal office building.

"The Department should not be evaluating the suitability of the site based on rules that were transparently reconfigured at the eleventh hour because DOE could not meet the statutory demands of Congress nor the scientific recommendations" of other agencies, Guinn added.

DOE spokesperson Joe Davis countered that

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YUCCA continued from previous page

the new rules merely reflect technological advances that add to, rather than detract from, the overall safety of the proposed storage facility.

"We're not relying specifically on engineered barriers to meet the regulations," said Davis. "We are looking at the scientific evidence of both the geological and engineered barriers together to determine the site's suitability. One doesn't outweigh the other. They both work hand in hand."

Proponents of the new rules point to several technological advances that have added to the safety of the proposed nuclear waste storage facility. Stronger and more corrosion-resistant canisters, for example, have been designed to combat fears water will seep through the rocks into the storage area. Drip shields have been designed to keep water from hitting the waste after the canisters disintegrate several hundred years from now. And new storage designs have been devised to combat high temperatures that may occur within the surrounding rock.

"We are basing the decision both on the science of the mountain and the engineered barriers that would be put in place," explained Davis. "We believe we have to rely on both."

Nevada seeks delay, observers question security

Earlier, Nevada had filed suit over proposed radiation standards. Robert Loux, Guinn's top advisor on the proposed nuclear waste site, said the Nevada state government is prepared to file as many as five additional lawsuits in the coming months.

Loux said the state hopes to obtain injunctions against the federal government, prohibiting it from taking any additional steps in furtherance of its Yucca Mountain plans until all disputes have been resolved in the courts. Loux speculated it would take the federal appeals courts at least several months to decide all contested issues, and that the state would reserve the right to take its claims to the U.S. Supreme Court if necessary.

Industry observers warned that the endless legal and political wrangling over Yucca Mountain was placing the nation at unnecessary risk to further terrorist attacks. Yucca Mountain is the only permanent storage facility under consideration, as all other proposed sites have failed to match the mountain's geological safety barriers.

While the legal and political wrangling continue, local energy companies have 40,000 metric tons of spent fuel in temporary storage at 72 different sites in 36 states. Security measures, not to mention radiation safety measures, are far less stringent in the dozens of temporary storage sites than they would be at a centralized location under a mountain of rock.

"While the legal and political wrangling continue, local energy companies have 40,000 metric tons of spent fuel in temporary storage at 72 different sites in 36 states."

Utah fights temporary storage facility

Native Indians want to lease reservation lands for waste storage

With the Yucca Mountain nuclear waste storage facility at least eight years from becoming operational, local energy companies are finding it increasingly difficult to store their accumulating spent nuclear fuel.

The Goshute Indians are proposing to alleviate the growing problem by leasing 820 acres of their reservation, roughly 70 miles from Salt Lake City, for the temporary storage of nuclear waste. However, the State of Utah is pursuing legal action to keep the Indians from accepting nuclear waste.

Utah has no nuclear power plants and has enacted laws banning storage of nuclear waste within its boundaries. However, the Goshute Indians have semi-sovereignty over their reservation and claim the state legislation does not apply to them.

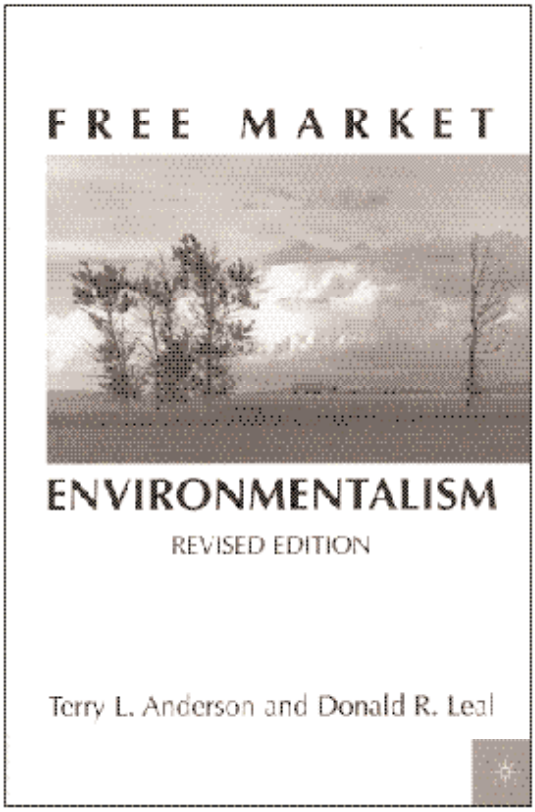
"American Indians control their lands, so utilities can exploit that and try to avoid the democratic process," asserted Utah Deputy Attorney General Larry Jensen. "The utilities go to tribes because they know the states are going to fight them. They only have to deal with the tribe."

The Goshutes, however, feel the minimal safety concerns are worth the benefits they would accrue. The spent fuel would be stored in 175-ton steel and concrete canisters situated on thick concrete pads until a permanent national waste storage facility is built. In return for leasing the space for the temporary storage facility, the tribe would receive significant revenue to pay for new housing, education, and health care initiatives.

Private fuel storage on the tribal lands "is an excellent fuel management strategy until Yucca Mountain is developed," said Rod McCullum, a senior project manager at the Nuclear Energy Institute.

"In return for leasing the space for the temporary storage facility, the tribe would receive significant revenue to pay for new housing, education, and health care initiatives."

Whether the Goshute Indians will be allowed to make such a determination for themselves will be decided in the courts in the months to come.



Free Market Environmentalism
Revised Edition
By Terry L. Anderson & Donald R. Leal

"Through their rigorous scholarship and intellectual integrity, Anderson and Leal make a compelling and provocative case for free market environmentalism that deserves the attention of anyone seriously concerned about the future direction of environmental policy."

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Density no solution for traffic, obesity problems

BY RANDAL O'TOOLE

The January issue of *Environment & Climate News* described a recent report published by Sprawlwatch as a "fake CDC" study. (See "Fake CDC study full of holes," *Environment & Climate News*, January 2002.) Although the report was written by Centers for Disease Control employees, it was not published by the CDC and not apparently endorsed by that agency. Yet many news reports described it as a CDC study, not a Sprawlwatch study.

While not the publisher of the study, the CDC does address issues similar to those covered in the report. The agency runs an "Active Community Environments" program that combines land use, transportation, and public health issues. According to its Web site (http://www.cdc.gov/nccdphp/dnpa/aces.htm), the program aims to promote walking and cycling.

The CDC program has published two reports: "How Land Use and Transportation Systems Impact Public Health: A Literature Review," and "How Land Use and Transportation Systems Impact Public Health: An Annotated Bibliography."

Although the reports can be downloaded from the CDC Web site, they were published by the Georgia Institute of Technology. Their title page contains the statement, "The content does not necessarily reflect the official views or policies of the Centers for Disease Control and Prevention or the Georgia Institute of Technology."

Unlike the authors of the Sprawlwatch study, the authors of the GIT reports, Lawrence Frank and Peter Engelke, are not doctors but urban planners affiliated with the Georgia Institute of Technology city planning school.

Biased literature review

Though the first report is described as a "literature review," it is clear the authors reviewed only the literature that supports their view. For example,

- They cite Newman and Kenworthy's claim that miles driven is related to density, based on the fact that Americans drive more than Europeans. The authors fail to cite work by UC Irving economist Charles Lave, who explains that differences between American and European driving are mostly income-related. ("Cars and Demographics," *Access*, Fall 1992)
- Frank and Engelke cite Sierra Club member John Holtzclaw's study claiming Americans in high-density neighborhoods drive less than Americans in low-density neighborhoods. They fail to cite MIT planner Paul Schimik's finding that differences in neighborhood driving are almost entirely explained by income and family size. ("Household Motor Vehicle Ownership and Use: How Much Does Residential Density Matter?" Transportation Research Board, 1996)

> **"[M]ore and more scientists appear willing to stretch the truth to raise public attention over problems they believe exist, even when they can't prove those problems are real."**

Frank and Engelke do cite USC planners/real estate experts Genevieve Giuliano and Harry Richardson, who explain that densities would have to be hugely increased to have any effect on driving at all. But Frank and Engelke dismiss the Giuliano/Richardson work by citing, again, Holtzclaw.

TRAFFIC continued on next page

District court upholds Clinton national monuments

Decision opens door to Supreme Court challenge of century-old statute

BY JAMES M. TAYLOR

A federal district court on November 15 upheld former President Bill Clinton's designation of six national monuments on federal lands in four Western states. Clinton's action was deemed permissible under the Antiquities Act, a 1906 federal statute that allows Presidents to act without congressional approval in protecting objects of historic and scientific interest from human development.

The lands in question are the Cascades-Siskiyou National Monument in Oregon, the Hanford Reach in Washington, the Canyons of the Ancients in Colorado, and the Great Canyon-Parashant, Ironwood Forest, and Sonoran Desert national monuments in Arizona.

Westerners objected the designations were unnecessary, improperly formulated, and enacted without consultation with local citizens.

According to the Mountain States Legal Foundation (MSLF), which challenged the designations in court, the Constitution vests Congress with exclusive authority over federal lands. In designating national monuments without the cooperation of Congress, MSLF asserted, Clinton exceeded his constitutional authority.

Moreover, argued MSLF, Clinton improperly designated lands that were not of historic or scientific interest, nor did he confine his designations to "the smallest area," as required by the Antiquities Act.

The district court, however, ruled Clinton acted properly because he used the "magic words" associated with the Antiquities Act. By explicitly stating the lands designated for national monument status were "of scientific interest," "historic," and limited to "the smallest area," Clinton ensured his judgment was beyond judicial scrutiny.

"It is not the court's role to plumb the record to see that there is substantial evidence" in support of the proclamation, or "to hold a trial to determine what facts or factors" went into the decision "beyond what is in the proclamation," stated the court.

"The courts have always upheld the Antiquities Act and will continue to do so in the future," said Earthjustice attorney Jim Angell.

MSLF President William Perry Pendley, however, contended the district court gave too much credit to the former President's judgment. Perry expressed confidence his group would prevail on appeal.

"We're talking about millions of acres of land that, with a stroke of a pen, the President set aside," said Pendley. "We believe the court needs to go further and say, 'Wait a second. Are these areas truly scientific? Are they historic? Is this the smallest area necessary to protect the resource?'"

"We are pleased that the district court issued an expeditious ruling in this case to permit this vitally important constitutional case to be on its way to eventual resolution in the U.S. Supreme Court," Pendley added.

> **"We are pleased that the district court issued an expeditious ruling in this case to permit this vitally important constitutional case to be on its way to eventual resolution in the U.S. Supreme Court."**
>
> **WILLIAM PERRY PENDLEY, PRESIDENT MOUNTAIN STATES LEGAL FOUNDATION**

"Because the Antiquities Act has not been reviewed by the Supreme Court for a quarter of a century and has not been subjected to an in-depth review for over 80 years, today's ruling was key to ensuring our ability to seek Supreme Court review sooner rather than later."

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TRAFFIC continued from previous page

Density doesn't determine driving

The problem with Holtzclaw's study is that people are likely to choose the neighborhood they live in based on whether or not they want to drive. If they want to drive, they choose a low-density, auto-friendly neighborhood. If not, they choose a denser, transit-intense neighborhood.

If Holtzclaw's claim that density determines driving were true, then differences in driving among urban areas would be strongly correlated with urban area densities. People may express their preference to drive or not drive when they choose their neighborhoods, but they are less likely to choose the urban area they reside in based on their driving preferences. Thus, the preference question is less important and density becomes more important.

U.S. urban areas range in density from little more than 600 people per square mile to nearly 6,000 people per square mile. Yet there is almost no correlation between density and miles of driving or commute mode. Thus, it is reasonable to conclude that the differences in driving levels found by Holtzclaw are based largely on preferences, not urban form.

For example, the 1990 Census found that 94.6 percent of commuters drove or rode autos to work in the nation's least-dense urban area, while 90.3 percent drove in the densest urban area. This is not good news for planners who want to increase their urban area's density.

Fearmongering and propaganda

The Executive Summary of the literature review quotes Benjamin Franklin as saying:

"To get the bad customs of a country changed and the new ones, thought better, introduced, it is necessary first to remove the prejudices of the people, enlighten their ignorance, and convince them that their interests will be promoted by the proposed changes; and this is not the work of a day."

This is a call for public health officials to join in propaganda campaigns to convince the public to support government action on environmental and social issues. Scientists in the past have stayed out of political debates. Today, more and more scientists appear willing to stretch the truth to raise public attention over problems they believe exist, even when they can't prove those problems are real.

For example, one of the assertions in the Sprawlwatch report is that American children are getting more obese, and that this is related to suburban driving. While it is true that an "epidemic" of child obesity has emerged in the past two decades, the cause is not the suburbs. No information in the Sprawlwatch report or any other study has indicated suburban children are more obese than urban ones.

Instead, the cause appears to be the hysteria raised over missing and abducted children in the 1980s. Before this campaign, the vast majority of school children walked to school. After it, two out of three are driven to school by their parents. Densifying the suburbs is not going to fix this.

"No information in the Sprawlwatch report or any other study has indicated suburban children are more obese than urban ones."

Moreover, child obesity is a problem in Canada (http://www.greenestcity.org/walk/ReasonsToWalk.pdf), Britain (http://www.bupa.co.uk/healthy_living/children/c_obesity/), and even India (http://www.clinic-2000.com/childhood.htm), which can hardly be accused of low-density sprawl.

In all three places, the problem is blamed in part on kids not walking to school. "Either they travel by bus, rickshaw, auto or they get dropped at the school over a motorcycle or by a car by one of the family members," says the Indian Web page. Since Canada and Britain each have more aggressive smart-growth programs than the U.S., we are not likely to cure child obesity through smart growth.

This is not to say the CDC's concerns for walking and obesity are not valid. It is also true that more pedestrian-friendly and bicycle-friendly urban designs could help make exercise more common. But such designs do not need to be auto-hostile, which is the real goal of many smart-growth advocates.

It appears the CDC has funded and is distributing an unscientific report that rehashes old claims that urban form influences travel habits. While that report states it is not the official view of the CDC, there can be little doubt that sprawl opponents aim for it to become the official view of the CDC and other public health agencies.

Randal O'Toole (rot@ti.org) is a senior economist with the Thoreau Institute (http://www.ti.org) and author of the recent book, The Vanishing Automobile and other Urban Myths.

For more information...

WWW The two CDC reports—"How Land Use and Transportation Systems Impact Public Health: A Literature Review," and "How Land Use and Transportation Systems Impact Public Health: An Annotated Bibliography"—can be downloaded from the Internet at **http://www.cdc.gov/nccdphp/dnpa/pdf/aces-workingpaper1.pdf** and **http://www.cdc.gov/nccdphp/dnpa/pdf/aces-workingpaper2.pdf**, respectively.

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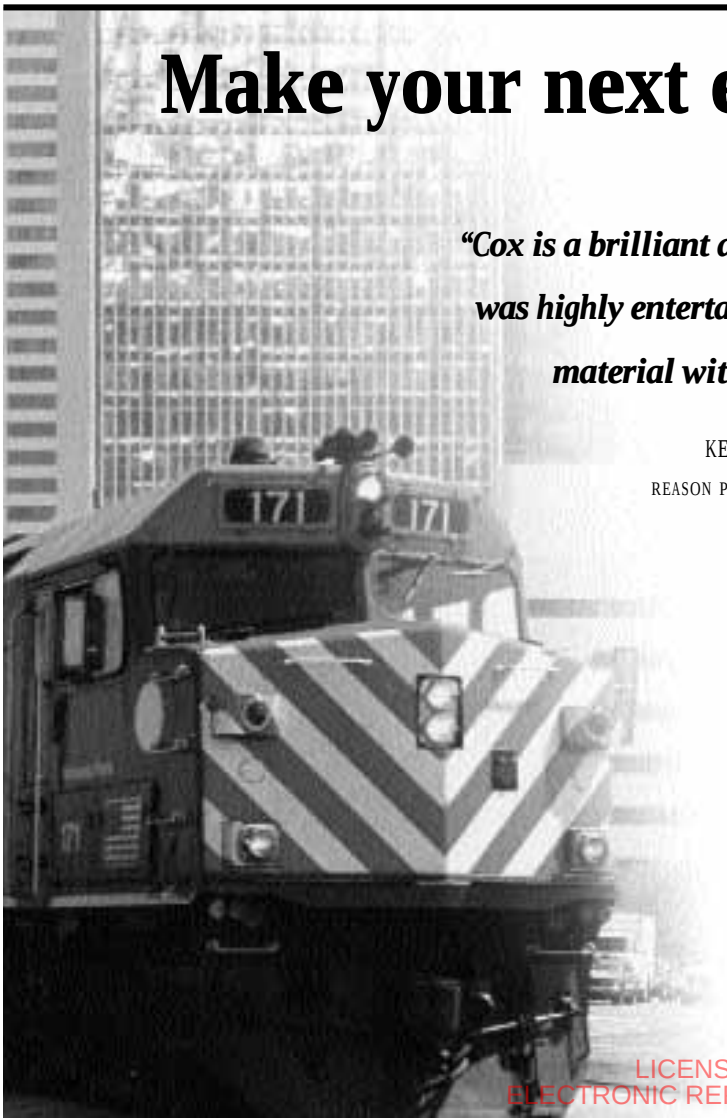

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KENNETH GREEN
REASON PUBLIC POLICY INSTITUTE

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Wendell Cox, a senior fellow of The Heartland Institute, is one of the country's most popular and often-quoted experts on urban "sprawl," smart-growth, and transportation issues.

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BY S. FRED. SINGER

Canada may not sign Kyoto

Minister for Industry laments economic costs

Minister for Industry Brian Tobin cast doubt on Canada ratifying the Kyoto Agreement on climate change: "There is a very strong consensus around the Cabinet table and in caucus that Canada must do nothing in competitive terms that would handcuff our capacity to compete around the world and with the United States," the Industry Ministry told mining industry executives. His comments are the first from a senior Canadian official to raise strong concerns about Kyoto.

The legal text for Kyoto was drafted in Morocco, starting the process of each country ratifying the agreement that aims to reduce carbon emissions that are the source of greenhouse gases, which are believed responsible for global warming.

Ottawa has promised consultations with Canadians before ratifying the international treaty. Ratification is expected by the middle of 2002.

A broad business coalition has urged Ottawa to produce a detailed analysis of how the Kyoto treaty will impact Canada. Industry fears it will face additional costs and regulatory burdens in meeting the Kyoto carbon reductions, making Canadian businesses uncompetitive with the U.S. As well, they believe the Kyoto deal will cause investment to shift to the U.S. and to Mexico, which is also not part of the Kyoto deal.

Tobin's remarks drew a strong round of applause from the mining executives. He assured them that Jean Chretien, the Prime Minister, has the wisdom and experience to make the right choices for Canada.

A carbon-free energy future?

Notes from an oral presentation at AGU meeting in San Francisco, December 12, 2001 by Henry R. Linden, Illinois Institute of Technology, and S. Fred Singer, Professor Emeritus of Environmental Sciences University of Virginia

It is generally agreed that hydrogen is an ideal energy source, both for transportation and for the generation of electric power. Through the use of fuel cells, hydrogen becomes a high-efficiency carbon-free power source for electromotive transport; with the help of regenerative braking, cars should be able to reach triple the current mileage.

Many have visualized a distributed electric supply network with decentralized generation based on fuel cells. Fuel cells can provide high generation efficiencies by overcoming the fundamental thermodynamic limitation imposed by the Carnot cycle. Further, by using the heat energy of the high-temperature fuel cell in cogeneration, one can achieve total thermal efficiencies approaching 100 percent, as compared to present-day average power-plant efficiencies of around 35 percent.

In addition to reducing CO_2 emissions, distributed generation based on fuel cells also eliminates the tremendous release of waste heat into the environment, the need for cooling water, and related limitations on siting.

"EPA has released a precedent-setting risk value for chloroform that for the first time finds that a non-pesticide carcinogenic compound can have a safe level of exposure."

Manufacture of hydrogen remains a key problem, but there are many technical solutions that come into play whenever the cost equations permit. One can visualize both central and local hydrogen production.

Initially, reforming of abundant natural gas into mixtures of 80 percent H_2 and 20 percent CO_2 provides a relatively low-emission source of hydrogen. Conventional fossil-fuel plants and nuclear plants can become hydrogen factories using both high-temperature topping cycles and electrolysis of water. Hydroelectric plants can manufacture hydrogen by electrolysis.

Later, photovoltaic and wind farms could be set up at favorable locations around the world as hydrogen factories. If perfected, photovoltaic hydrogen production through catalysis would use solar photons most efficiently. For both wind and PV, hydrogen production solves some crucial problems: intermittency of wind and of solar radiation, storage of energy, and use of locations that are not desirable for other economic uses.

A hydrogen-based energy future is inevitable as low-cost sources of petroleum and natural gas become depleted with time. However, such fundamental changes in energy systems will take time to accomplish. Coal may survive for a longer time but may not be able to compete as the century draws to a close.

EPA issues chloroform risk finding . . .

What's happening at EPA? Is it changing?

EPA has released a precedent-setting risk value for chloroform that for the first time finds that a non-pesticide carcinogenic compound can have a safe level of exposure. The chloroform risk file was released on the agency's Integrated Risk Information System (IRIS) following an agency-wide consensus process.

The chloroform characterization is the first

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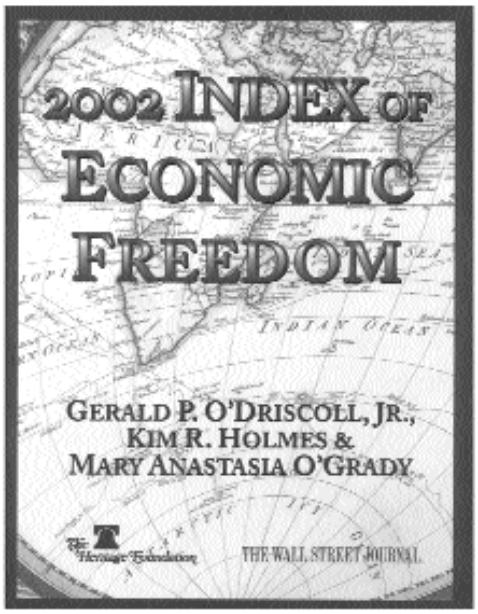
A New Book from The Heritage Foundation and The Wall Street Journal



2002 Index of Economic Freedom

Edited by Gerald P. O'Driscoll, Jr., Kim Holmes, and Mary Anastasia O'Grady

Now in its eighth edition, the *Index of Economic Freedom*, published jointly by The Heritage Foundation and the Wall Street Journal, measures the level of freedom and prospects for growth in our global economy. The *Index* is a practical reference guide to the economies of 161 countries. This year, the *Index* includes a detailed discussion of the role of property rights and economic growth along with detailed information about foreign investment codes, fiscal burden of government, tariffs, banking regulations, monetary policy, black markets, and more.

The *2002 Index of Economic Freedom* is an essential resource for anyone who invests or does business abroad. It is also a valuable guide to economic growth for those who want to understand the reasons that some economies flourish and others lag behind. A Spanish-language and an online interactive version. The Web version contains the full text, as well as the past years scores for each of the 161 countries in all 10 categories. The search engine allows users to rank countries by overall score and policy factors for each of the years the *Index* has been in print.

"...the *Index of Economic Freedom* records a workaday year — the gradual extension of the trend toward economic freedom in place since 1989. The global lesson is that economic freedom builds prosperity."
Robert L. Bartley
Editor, *The Wall Street Journal*

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SINGER continued from previous page

time under the IRIS program the agency concluded a compound has a nonlinear dose response curve. However, according to *Inside EPA*, some EPA and health officials have raised concerns about how the risks to children are presented in the chloroform risk file.

According to the IRIS file, "there is no suggestion from available studies of chloroform to indicate that children or fetuses would be qualitatively more sensitive to its effects than adults." The children's section has implications for future chemical evaluations under the agency's draft 1999 cancer risk assessment guidelines because it is the first time such issues have been specifically addressed under a new provision in the 1999 version of the guide.

. . . and reauthorizes biotech corn

EPA announced October 16 that it had reauthorized commercial planting of genetically modified corn varieties transformed with genes from the bacterium *Bacillus thuringiensis*. Bt corn, as it's known, makes proteins lethal to caterpillars of the European corn borer and other damaging insects.

The seed companies can now market the products for another seven years, depending on compliance with requirements set forth in the re-registration document. The agency provisionally approved Bt cotton in late September.

Pink Floyd releases "carbon-neutral" album

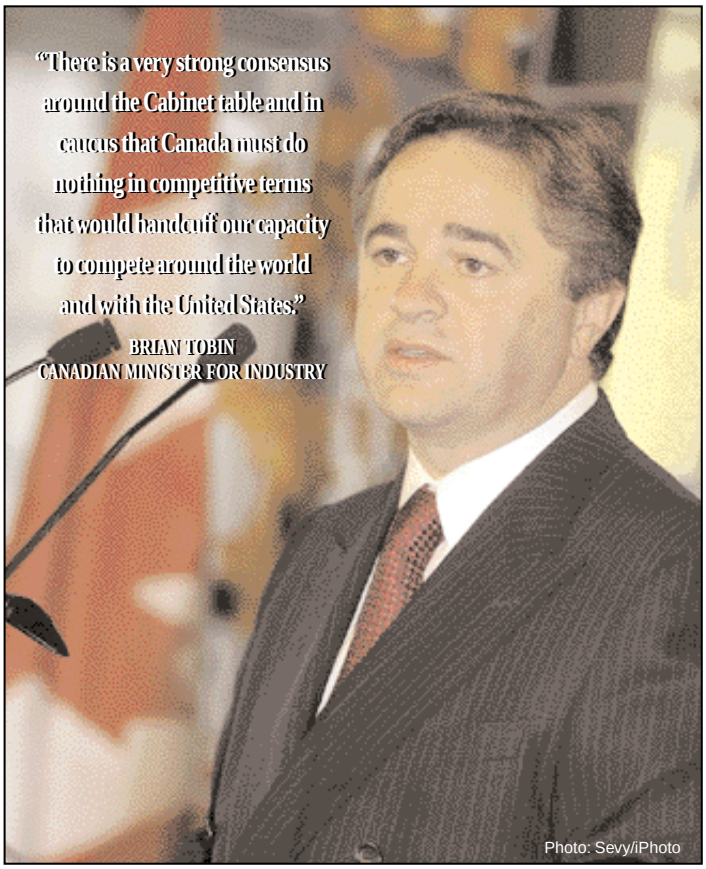
The latest album from the rock band Pink Floyd is going to result in the creation of four new long-term indigenous forests, with the number of copies being sold reflected in the number of trees planted.

The band's new album, *Echoes*, a dual-CD retrospective with 26 greatest hits, will become carbon-neutral, so that the carbon emissions resulting from its production and distribution will be offset by the planting of indigenous forests in Dryhope Burn, Scotland; Bangalore, India; Chiapas, Mexico; and Tensas River National Wildlife Park, Louisiana.

The project is being carried out in conjunction with the carbon-neutral consultancy company, Future Forests. "Our climate is changing. We can all do something to stop the problem escalating—and no action is too small," said Future Forests co-founder Dan Morrell. "Alongside reducing emissions at source, forestry has a real role to play, soaking up some of the carbon dioxide in the atmosphere. We are proud to be working with Pink Floyd and their fans, to help make a difference."

According to Future Forests, the music industry was among the first supporters of the company's scheme, beginning four years ago around a camp fire at Glastonbury Festival, when Neneh Cherry was so excited by the scheme that she helped the company talk to other music industry stars, including Neil Tennant of the Pet Shop Boys.

S. Fred Singer, professor emeritus of environmental sciences at the University of Virginia and president of the Science and Environmental Policy Project, shares his thoughts on environment and climate news stories of the month. Singer's The Week That Was *columns can be found at www.sepp.org.*


"There is a very strong consensus around the Cabinet table and in caucus that Canada must do nothing in competitive terms that would handcuff our capacity to compete around the world and with the United States."
BRIAN TOBIN
CANADIAN MINISTER FOR INDUSTRY
Photo: Sevy/iPhoto

The Science & Environmental Policy Project (SEPP)

SEPP is an association of scientists and engineers concerned about the use of sound science as the basis for environmental-policy decisions. With junk science, such policies can waste billions of taxpayers' dollars that can better be spent on other societal problems.

SEPP was founded in 1992 by atmospheric physicist S. Fred Singer, professor emeritus of Environmental Sciences at the University of Virginia, former director of the U.S. Weather Satellite Service, and former chief scientist of the Department of Transportation. SEPP chairman is Dr. Frederick Seitz, president emeritus of Rockefeller University and former president of the U.S. National Academy of Sciences. The board includes distinguished scientists from many countries.

All our scientists, officers, and board members work on a pro-bono basis and do not receive salaries or fees. SEPP does not solicit support from either government or industry but relies on private donations and occasional foundation grants.

SEPP is a 501(c)(3) educational/research organization, incorporated in Virginia. All contributions are tax-deductible to the full extent of the law. Documentation will be provided for donations of $250 and higher, or upon request.

Highlights of 2001

During 2001, SEPP concentrated its efforts on the issue of global warming and demonstrated the lack of any scientific basis for mandatory restrictions on emissions of carbon dioxide (and energy use), as would be required by the Kyoto treaty that was actively promoted by the past administration. President Bush has labeled Kyoto as "fatally flawed" and the U.S. has refused to support it.

SEPP organized scientific briefings at international climate conferences and the successful "Student Climate Crusade" that drew 40 American college students to Bonn, Germany, in July 2001, where they were the only group to demonstrate publicly (and noisily) in favor of the U.S. position.

In addition to some two dozen seminar lectures at universities and scientific conferences during 2001, SEPP also organized a scientific briefing on global warming at the Austrian Parliament in Vienna in November. The briefing team included SEPP president Fred Singer and five European climate scientists.

For more information, contact:
Science and Environmental Policy Project
1600 South Eads Street, Suite #712-S
Arlington, VA 22202
Web site: **www.sepp.org**

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Feds block Michigan's shoreline drilling plan

"Canada owns one-half of all the Great Lakes, with the exception of Lake Michigan, and allows substantial drilling in its half. 'There's nowhere near the debate in Canada that you're seeing in the U.S. That's your debate.'"

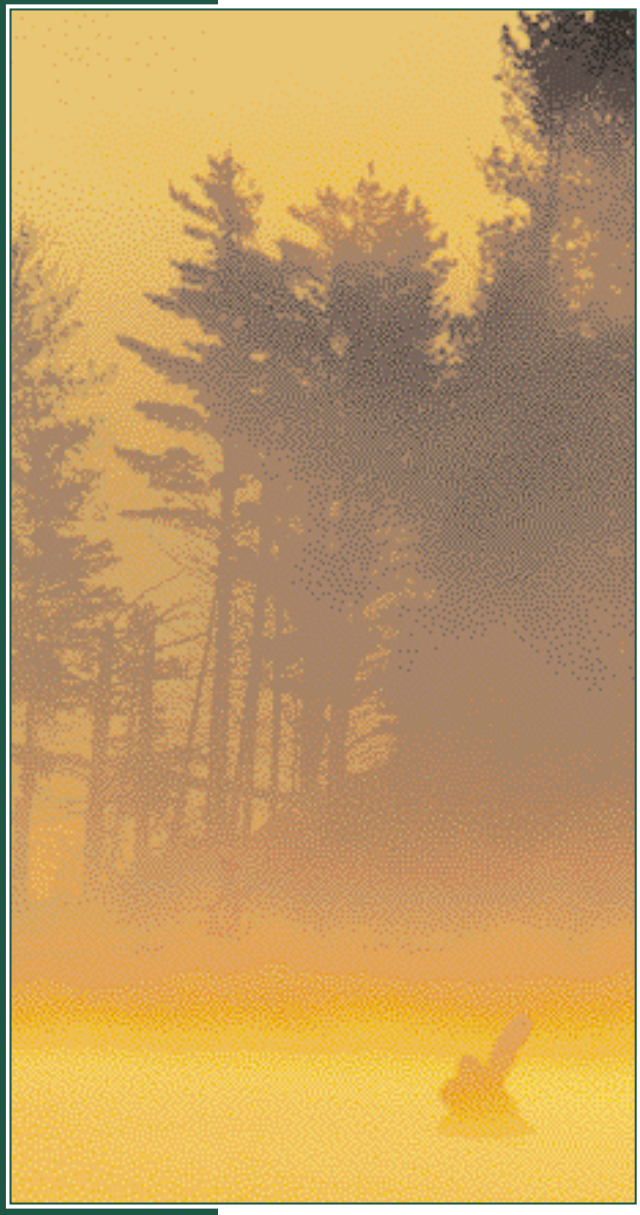
BY JAMES M. TAYLOR

The State of Michigan suffered a blow to its economy and its environmental programs when President George W. Bush on November 14 signed a federal water and energy bill temporarily halting oil and gas drilling in and around the Great Lakes.

Governor prepared to lift restrictions

Following a recommendation by the Michigan Department of Natural Resources (MDNR), Michigan Governor John Engler was prepared to lift drilling restrictions on Lake Michigan and Lake Huron that he imposed in 1997. Engler had decided to lift the restrictions after MDNR studies showed drilling would pose no threat to the lakes.

Although the eight Great Lakes states ban drilling from platforms on the lakes themselves, Michigan proposed to allow land-based drilling at an angle beneath the water. According to MDNR, modern technology assures there is little or no risk of a spill from the proposed drilling. Even if a spill were to occur, concluded MDNR, the small risk would be confined to the onshore wellhead. There would be no risk of a spill affecting the lakes themselves.



Dawn Mist at Lake Superior -- Putting another dent in President George W. Bush's energy plan, the United States Senate voted to prohibit oil and gas drilling in the Great Lakes for the next two years. This photo depicts the Lake Superior shoreline from Michigan's Upper Peninsula. The area provides habitat for the endangered Great Lakes population of piping plovers. Photo: Steven Holt/PictureDesk

Senator sponsors federal intervention

The legislation signed by Bush, however, included an amendment halting Great Lakes drilling until September 2003. The amendment was sponsored by Senator Debbie Stabenow (D-Michigan), after she failed to convince her own state officials to ban future oil and gas recovery.

Susan Shafer, Engler's press secretary, worried federal intervention in the state's oil policies may signal greater federal meddling in a broad array of issues traditionally entrusted to the individual states.

"Today it's the federal government telling us what to do with oil and gas, and tomorrow it could be them telling us to send our water to other states," asserted Shafer.

Shafer indicated the state is considering a suit against the federal government, but hasn't made a final decision yet.

"We're looking at our options. I don't have a yes or no answer ... but we will look at our options. This is a terrible precedent."

Significant reserves taken off the board

The extent of Lake Michigan's recoverable oil resources is still unknown. Estimates range from a minimum of 30 million barrels to a maximum of 500 million.

Although the Lake Michigan deposits pale in comparison to the Arctic National Wildlife Refuge's estimated 3 billion to 16 billion barrels, the Lake Michigan oil reserves are nevertheless quite substantial. The state currently ranks 17th out of the 50 states in oil production, even though its land-based wells produce only 8.3 million barrels of oil each year.

Before Engler imposed the 1997 drilling restrictions, 13 directional wells were drilled along the Michigan shore. Engler cited environmental concerns as motivating his restrictions, and he asked that a board of environmental advisors conduct a study on the environmental impact of drilling. With the board concluding that directional drilling poses little risk of a spill and no risk to the lakes themselves, Engler was ready to lift his drilling restrictions.

Environmental programs hurt by lost revenues

Ken Silfven, a spokesperson for the Michigan Department of Environmental Quality, asserted the environmental concerns behind the federal legislation fly in the face of scientific data. Silfven argues that well leases have actually been environmentally friendly, providing $15 million in funds the state uses to buy and maintain parks. Silfven foresees $100 million in additional state revenue, much of which would be used for the benefit of new environmental programs, if the state is allowed to resume drilling.

Canada continues Great Lakes drilling

Although the United States government has banned Great Lakes drilling for the immediate future, this hasn't halted oil and gas drilling altogether. Canada owns one-half of all the Great Lakes, with the exception of Lake Michigan, and allows substantial drilling in its half. Lake Erie in particular has proven to be a valuable source of Canadian oil.

"Yes, we've had spills of oil, and leaks of gas occur," said Rudy Rybansky, chief engineer for Ontario's Department of Natural Resources, but "everything has been minor. We haven't had any problems. There's nowhere near the debate in Canada that you're seeing in the U.S. That's your debate."

Added Michigan attorney Jack Lynch, "Sometimes, we need fuel and drilling is encouraged. When there aren't lines at the gas stations, the view is that drilling is bad. This is what I say: If we aren't drilling now, we can't suddenly turn the valve on the next time we really need it."

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DASCHLE continued from page 1

cloning ban. Foreseeing they would lose the energy vote due to the attendant cloning bill, the Republican leadership on December 3 withdrew its support for the cloning/energy package.

"We ended up picking ourselves off," commented Senator Rick Santorum (R-Pennsylvania), chairman of the Republican conference.

"In all my years, I don't recall a more unusual marriage of issues involving public policy than this one," Daschle agreed.

Republican leaders vowed that in the future they would attach only one bill at a time to legislation favored by Daschle.

Daschle unveils own energy plan

Daschle followed up his railroad pension fund victory by unveiling his own energy bill on December 5. The measure resuscitates many of the mandatory conservation and alternative fuel policies last seen during the Jimmy Carter administration. Specifically, the Daschle bill would:

- spend more tax dollars on energy conservation research;
- require American consumers to more than double their purchase of ethanol and bio-diesel gasoline;
- give the federal government more power to regulate the energy industry;
- require American consumers to purchase 500 percent more energy from "renewable" sources, such as wind and solar power;
- allow alternative-fuel vehicles to travel in High-Occupancy-Vehicle lanes on interstate highways; and
- provide more federal funds to pay the energy bills of low-income families.

Additionally, Senate Democrats plan to add language requiring higher fuel mileage standards for cars and light trucks.

Daschle promised his energy bill would "strengthen the economy, protect the environment, and provide energy security for decades to come."

Countered Republican Senator Frank Murkowski of Alaska, "What this is really all about is a charade, a charade as a consequence of the extreme zealous environmental groups that are opposed to an energy bill and opposed to opening up ANWR."

Observed Patrick Michaels, senior fellow at the Cato Institute, "To achieve more independence in energy, you have to produce more domestic energy. That is precisely what Mr. Daschle's bill doesn't do. Instead, it hearkens back to decrepit, discredited solar energy, which will never provide us much unless the sun blows up. In that case we'd have much bigger fish frying. Mr. Daschle's bill also promotes windmills, which are plumb ugly, and stop working precisely when energy demand is the greatest (during the hottest or coldest temperatures, which usually occur under calm conditions)."

Added Myron Ebell, director of global warming policy at the Competitive Enterprise Institute (CEI), "As a collection of failed policies, idiotic and expensive new programs, and government payoffs to special interests, Daschle's bill has few equals in the history of Congress. It looks like a bigger version of the Dark Ages policies of the 1970s that produced high energy prices and long lines at the gas pumps."

"Daschle's bill is anti-consumer. It would raise prices and reduce choices for Americans, and it would waste tens of billions of taxpayer dollars on subsidies for things that have already been proven not to work," said CEI senior policy analyst Ben Lieberman.

Daschle stated he would call for a vote on his plan by the end of February, but would not allow a vote on any bill that would allow drilling in ANWR.

Teamsters challenge Daschle tactics

Daschle's posturing notwithstanding, pressure continued to mount across the political spectrum for a full Senate vote on ANWR.

"Several members of the other side don't want a vote on ANWR because they know they would lose," said Murkowski. "They didn't have the votes in committee and we did."

Added Teamsters President James P. Hoffa, "Exploring in the ANWR is clearly the right thing to do. It will reduce our reliance on foreign oil, while creating thousands of jobs for working families. A vote on the energy package must not be delayed any longer."

Lawsuit seeks drilling ban in remote Utah

BY JAMES M. TAYLOR

Two environmental groups on December 6 filed a lawsuit against the federal government to prohibit oil recovery in remote areas of southern Utah.

The federal Bureau of Land Management has granted 12 leases to private companies for oil and gas exploration in one of the most desolate portions of the country. The remote area of Utah at issue is often featured in Western movies portraying the most hostile elements of the Old West. Nevertheless, the National Resources Defense Council (NRDC) and the Southern Utah Wilderness Alliance argue the region is inappropriate for oil drilling.

"There are places where drilling is appropriate, and it's already going on," said NRDC attorney Johanna Wald. "But it is unnecessary and inappropriate to drill in these environmentally sensitive areas. We cannot drill our way to energy independence."

"According to the NRDC, the region is environmentally sensitive because it contains buried pottery shards and other remnants of ancient Indian tribes."

According to the NRDC, the region is environmentally sensitive because it contains buried pottery shards and other remnants of ancient Indian tribes. The region is also home to the occasional antelope, sheep, falcon, and cactus.

"The administration has committed these sensitive parcels of land to oil and gas development without ever taking the time to examine what that leasing and development will mean to these extraordinary lands," said Wald.

In addition to its federal lawsuit, the NRDC is pressing Congress to designate 9.1 million acres of the region as protected wilderness. An NRDC-supported bill to that effect is currently pending in both the House and the Senate.

New Russian oil pipeline recognizes benefits of increased production

Russian, world economy bolstered by low oil prices

BY JAMES M. TAYLOR

While U.S. politicians debate the pros and cons of natural resource recovery in the Arctic National Wildlife Refuge, Russia and Kazakhstan have opened a new oil pipeline, assuring their roles as major players in the international oil trade.

Russia's growing influence

The new pipeline, opened in the final week of November 2001, is the first to bring Kazakhstan's substantial oil reserves to world markets. The 940-mile pipeline was made possible by a Caspian Pipeline Consortium of Russia, Kazakhstan, and various oil companies. It is projected to bring Russia $20 billion in new oil revenues.

By encouraging the recovery of its largest oil reserves, Russia is fast emerging as a nation with considerable leverage over OPEC and world oil prices. Not only is Russia now the world's largest non-OPEC oil exporter, but the second- and third-ranking non-OPEC exporters, Mexico and Norway, have indicated they will base their production decisions more on Russia's lead than on the whims of OPEC.

In the past two years, Russian oil production has risen by over 15 percent, and now represents nearly 10 percent of global production.

U.S. benefits from increased production

The potential benefits of substantial non-OPEC oil production were seen in the second half of 2001, as Russia defied OPEC's call for substantial cuts in world oil production. The more OPEC cut production, the more Russia picked up the slack, ensuring the lowest oil prices seen in years.

"A low oil price is in the interest of everyone except the oil producers," noted Robert Parker, deputy chairman of Credit Suisse Asset Management.

Parker asserted that low oil prices have kept the world economy from sinking deeper into recession and will likely be the catalyst for a quick recovery. Parker predicted that if Russia continues to thwart OPEC production cuts, the price of oil could further drop to $15 or $16 per barrel.

"I am sure the American and European governments like the idea of $15-$16 a barrel because that will underpin … the G7 economies," said Parker.

Even the *New York Times*, long critical of increased oil production as an alternative to the Carter-era policies of conservation and alternative fuels, noted the benefits to America accrued through Russia's increasing oil production.

"The timing could hardly be better," stated a November 30 *New York Times* house editorial. "Maintaining current Russian production levels would spare the already sputtering world economy from the added burden of artificially high energy prices."

Can we rely on current Russian policy?

Russia's recent inclination to use its oil leverage for the benefit of the U.S. economy is not guaranteed to be permanent. In the weeks and months prior to the September 11 terrorist attacks, Russia and China were publicly speaking of a new alliance to counter the U.S.

With the Russian example demonstrating the positive influence friendly oil production can have on world markets, proponents of natural resource recovery in the Arctic National Wildlife Refuge are likely to push harder for U.S. emulation of Russia's pro-recovery oil policies.

"[L]ow oil prices have kept the world economy from sinking deeper into recession and will likely be the catalyst for a quick recovery."

"There is compelling logic to looking down the road and taking steps now that would prevent us from continually being beholden to unstable parts of the world," explained Luke Popovich, spokesperson for the Alliance for Energy and Economic Growth.

Americans must not forget how important heightened production is in ensuring a stable and benign energy market, advised Popovich.

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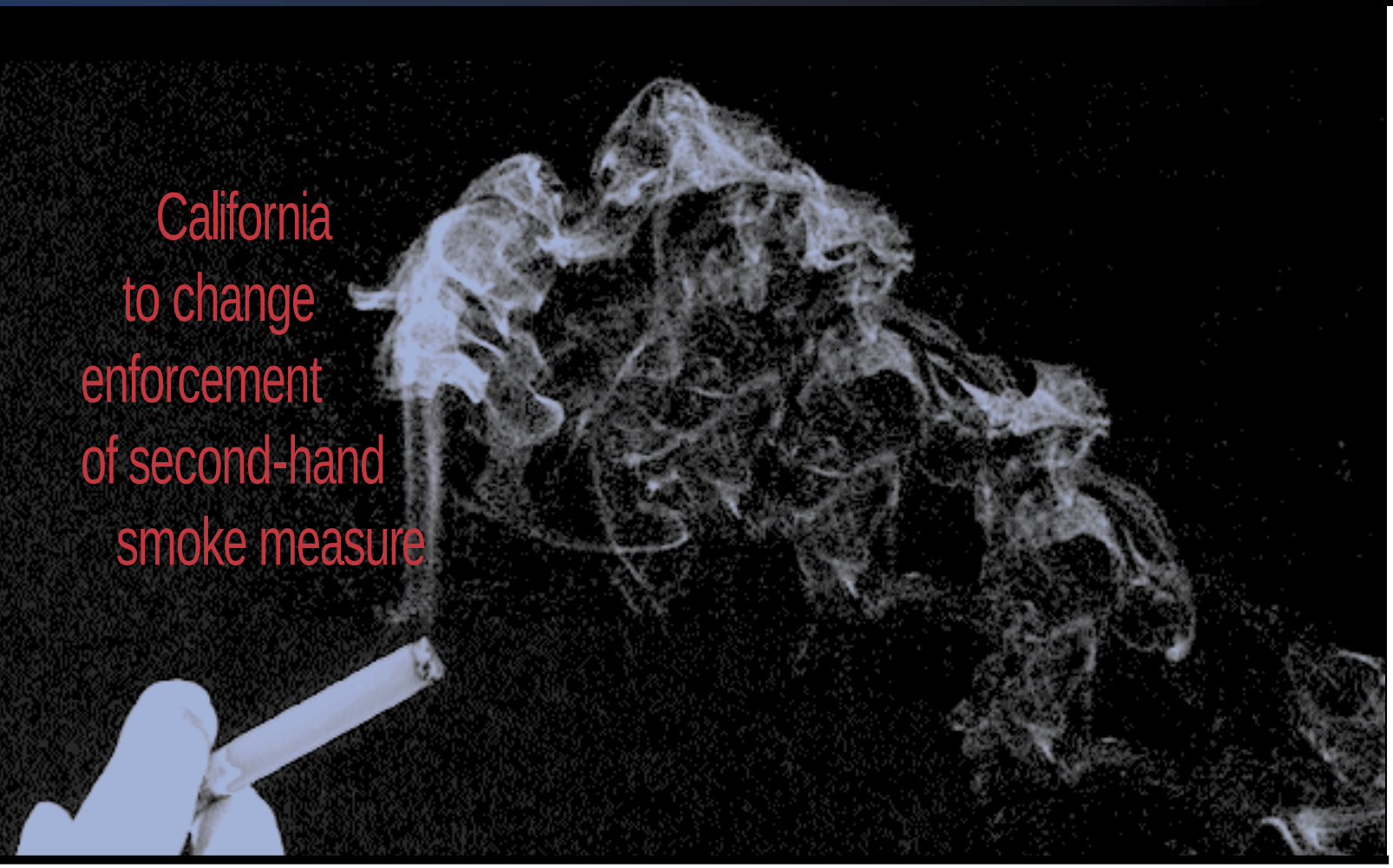
California to change enforcement of second-hand smoke measure



BY DAN HANKET

By now, many commercial enterprises in California that permit the legal sale or use of tobacco on their premises have been confronted with 60-day notice letters and civil complaints for allegedly failing to post required warnings, in violation of California Health and Safety Code 25249.5 ("Proposition 65").

Passed into law in 1986, Proposition 65 was designed to limit the California public's exposure to possibly hazardous chemicals—those that might cause cancer or reproductive toxicity. It is essentially a "right-to-know" law that seeks to provide consumers with information.

The measure authorizes "private enforcers" to pursue civil penalties against businesses that choose settlement over a cost-prohibitive legal challenge. Some private enforcers have been very successful in these efforts—even though they have not visited the properties at issue or sought or obtained technical support to show that exposures to second-hand smoke have occurred at levels requiring the posting of Proposition 65 warnings.

When Proposition 65 was passed, most observers believed the law contained sufficient procedural protections against enforcement abuses. Before commencing an action and filing a settlement in court, for example, private enforcers were required to give notice of the alleged violation to the Attorney General, the district attorney, any city attorney or prosecutor in whose jurisdiction the violation was alleged to have occurred, and to the alleged violator. The Attorney General was afforded 30 days within which to review any proposed settlement.

Nevertheless, concerns developed that plaintiffs were bringing frivolous suits. Moreover, some worried that defense counsel, along with certain plaintiffs, were achieving settlements perceived as not protective of the public interest.

California Senate Bill 471, which took effect January 1, 2002, provides additional requirements to fend off frivolous private enforcement actions by imposing additional pre-filing requirements on private enforcers, establishing criteria for the assessment of civil penalties, and increasing the roles of both the Attorney General and the courts in the settlement process.

While these new measures may work to stem abuses, they may also increase the burdens imposed on those unfortunate enough to be caught in the crosshairs of the Proposition 65 enforcer.

Certificate of merit

The new law gives the Attorney General 60 days within which to review allegations of violations of the Proposition 65 warning requirements. The private enforcer will be required to include in its notice of alleged violation a "certificate of merit" attesting to the seriousness of the allegation.

The certificate must indicate that:

(1) the person executing the certificate (either the attorney for the noticing party, or the noticing party) has consulted with one or more persons with "relevant and appropriate" experience;

(2) this person has "reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action"; and

(3) this person believes there is a "reasonable and meritorious case" for the private action.

Factual information in support of the certificate must be attached to the certificate and forwarded to the Attorney General.

"Passed into law in 1986, Proposition 65 … authorizes 'private enforcers' to pursue civil penalties against businesses that choose settlement over a cost-prohibitive legal challenge."

If the defense is ultimately successful and the court, based on its review of the certificate, concludes "there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened," then the court may deem the case frivolous and order the private enforcer, his or her attorney, or both to pay reasonable expenses, including attorneys fees, to the successful party.

The legislature decided to make the certificate of merit off-limits to the special discovery provisions of the Health & Safety Code. Therefore, only by engaging in the time-consuming and perhaps costly traditional discovery process, which the certificate of merit provision does not affect, may a defendant be in a position to demonstrate the case is frivolous.

It remains to be seen whether the Attorney General will have sufficient staff and level of interest to become embroiled in disputes over the merits of a proposed enforcement action based on a deficient certificate of merit.

New penalty criteria

Proposition 65 states that a violator of its provisions shall be liable for a civil penalty not to exceed $2,500 per day for each violation. If the complainant and alleged violator reach a settlement, one of the parties simply files with the court the stipulation for entry of consent judgement, order approving the stipulation, and proposed judgment. The court typically approves the judgment.

Senate Bill 471 inserts penalty-assessment criteria patterned after several environmental statutes and regulations. In its assessment of the penalty, the court is required to consider:

- the nature and extent of the violation;
- the number and severity of the violations;
- the economic effect of the proposed penalty on the violator;
- whether the violator took good-faith measures to comply with Proposition 65 and when those measures were taken;
- the willfulness of the violator's misconduct;
- the deterrent effect the imposition of the penalty would have on both the violator and

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Maryland county ridiculed for attempted smoking ban

Measure "ripe for abuse," based on speculative science

BY JAMES M. TAYLOR

Montgomery County, Maryland, already nationally known for its stringent anti-smoking laws, passed and then retracted a law penalizing people for smoking in their own homes. The law was approved on November 20, but was retracted just seven days later after the county became the object of national and global ridicule.

Under the law, a person could be fined up to $750 for each time a neighbor complained about smelling tobacco smoke coming from a person's home. The law was originally drafted to protect persons from exposure to indoor pollutants such as asbestos, radon, molds, and pesticides. However, the Montgomery County Council voted to add tobacco smoke to the list of alleged pollutants.

Council members argued tobacco smoke is a carcinogen and should be treated like any other indoor air pollutant.

"My sympathies are with the kid next door who has asthma who has to put up with a pollutant crossing the border," explained Democratic Councilman Philip Andrews.

"Ripe for abuse"

When news of the law became public, it was met with nearly universal derision. American and European commentators frequently compared the law to the authoritarian excesses of the Afghanistani Taliban.

"Montgomery County might be a plausible asylum for the Taliban," asserted the *American Spectator*'s R. Emmett Tyrrell, Jr. "Once settled there, the Taliban might also find Americans who share their phobia against kite flying and the public playing of music."

"What about barbecue grilling?" mused syndicated columnist Cal Thomas. "If smoke from someone's grilling steak offends his Montgomery County neighbor, can the neighbor call the cops? What about perfume? Some people are allergic to such scents. Could the wearer be a potential criminal? This law is ripe for abuse, especially if one dislikes his neighbor."

Arthur Spitzer, legal director for the American Civil Liberties Union, warned the county its legislation had gone too far.

"They shouldn't be able to prevent a person from smoking in their home unless they can show that the amount of smoke is harmful to the health of others," said Spitzer. "If someone can just say, 'Yuck, I don't like the smell of cigarettes,' that's no different than someone saying, 'Yuck, I don't like the smell of your cooking because you use too much garlic.'"

"We've become the laughingstock of the world," lamented Michael Subin, one of only two Councilmen who originally opposed the bill.

Subin further observed the law would have a disproportionate effect on poor people. "If you live in a house on a two-acre lot, you are exempt from the moral police, but not if you are unfortunate enough to live in a small townhome or an apartment."

One size fits all

Feeling the heat, Montgomery County Executive Director Douglas Duncan vetoed the legislation, and Councilman Howard Denis reversed his support of the ban, ensuring the veto could not be overridden by the Council.

Stated Duncan, "Upon further consideration, it has become clear that the tobacco smoke provision will be nothing more than a tool to be used in squabbles between neighbors."

"If the ordinary folk of Montgomery County had not asserted common sense," observed Tyrrell, "imagine all the quarreling and general hostility that would have spread with neighbors calling the cops on suspected cigarette smoke."

"Regulating the minor potential irritations of apartment life is basically the job of the building owner, not the county," agreed Sam Kazman, general counsel for the Competitive Enterprise Institute. "Some owners might well choose to operate their buildings as totally smoke-free, others might reserve the right to restrict smoking on a case-by-cases basis, and still others might not restrict at all. Each of these approaches serves a different segment of the public. We don't need a one-size-fits-all standard imposed by the county."

The law was especially suspect, according to critics, because it failed to distinguish between a profusion of smoke that might he harmful and a slight odor that merely causes offense.

Dangers of secondhand smoke doubted

Even the assertion that higher levels of secondhand smoke cause serious health problems is speculative at best.

Steven Milloy, an adjunct scholar at the Cato Institute, points out that "A credible link between secondhand smoke and lung cancer remains elusive despite more than 40 published studies. The largest-ever study on secondhand smoke and lung cancer, published in 1998 by the World Health Organization's International Agency for Research on Cancer, reported no statistically significant increase in lung cancer risk associated with exposure to secondhand smoke."

> **"We've become the laughingstock of the world."**
>
> MICHAEL SUBIN, COUNCILMAN
> MONTGOMERY COUNTY

Moreover, reports Milloy, in 1993, at the time the Environmental Protection Agency declared secondhand smoke was linked to lung cancer, "there were about 30 studies from around the world involving human populations exposed to secondhand smoke. Some studies reported weak statistical associations between exposure to secondhand smoke and lung cancer. The vast majority of studies reported no statistical association."

"But since EPA already had pre-determined that secondhand smoke caused lung cancer—issuing guidelines for banning workplace smoking in 1989—something had to be done to whip the science into shape," says Milloy. "The agency released a fudged result as its final product, concluding that secondhand smoke was a lung carcinogen that caused 3,000 deaths per year."

A federal district court threw out the 1993 risk assessment leading to EPA's decision to list secondhand smoke as a cancer-causing carcinogen. Stated the court, "EPA disregarded information and made findings on selective information; . . . deviated from its [standard procedures]; failed to disclose important findings and reasoning; and left significant questions without answers. EPA's conduct left substantial holes in the administrative records."

Dr. Elizabeth Whelan, president of the American Council on Science and Health in New York, points out that "the role of ETS [environmental tobacco smoke] in the development of chronic diseases like cancer and heart disease is uncertain and controversial."

Instead, the major effect of secondhand smoke is to act as an irritant, exacerbating minor, preexisting conditions. "The evidence linking ETS with chronic disease is much more speculative than that linking it to acute diseases like ear infections and respiratory effects," notes Whelan.

County goes back to the drawing board

Montgomery County's aborted decision to criminalize at-home smoking was not the first, nor will it likely be the last, of its notorious anti-smoking laws.

On December 12, 2000, the County Council approved the nation's strictest tobacco ban, prohibiting smoking on all public property, including open-air streets and sidewalks, in the village of Friendship Heights.

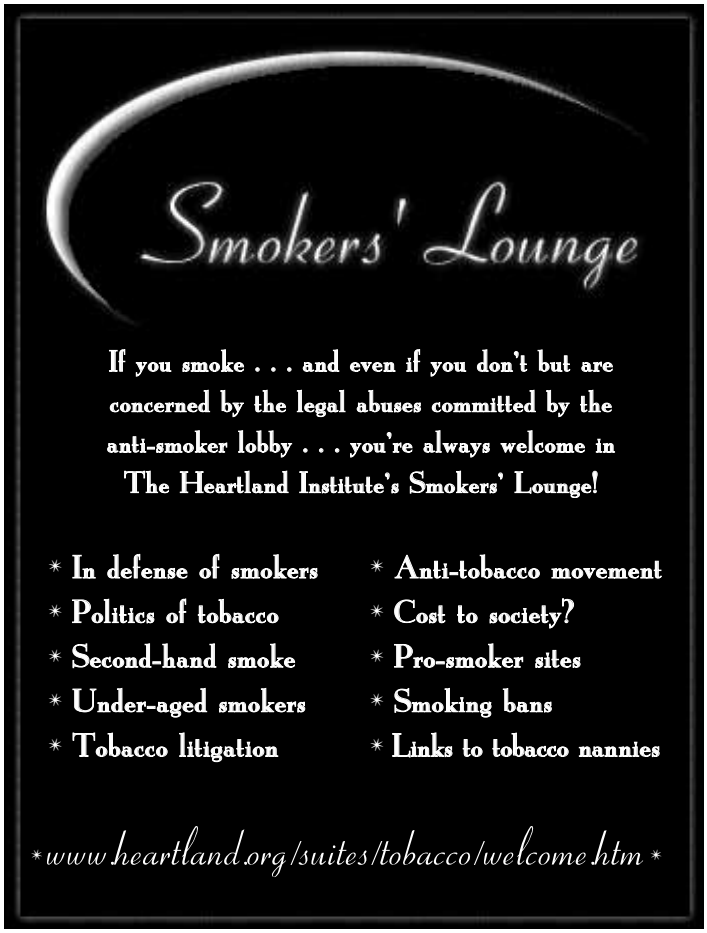
Friendship Heights Mayor Alfred Muller justified the ban as good for smokers and nonsmokers alike. "No one should be told, 'I was here first. You don't like the smoke, go somewhere else,'" said Muller.

Moreover, smokers should be appreciative, asserted Muller, because "This is a way to discourage them from smoking."

"I don't think we're justified in prohibiting someone from smoking so broadly all times of the day," countered Councilman Philip Andrews. "When laws go too far, they lose the respect of the public."

A judge threw out the December 2000 anti-smoking law soon after it was enacted. However, supporters of the invalidated legislation have continued to search for ways to enact similar legislation in a manner that will survive a court challenge.

Now that County Executive Douglas Duncan has withdrawn his support for the indoor smoking legislation, council members are vowing to try again to enact a smoking ban that will pass political and legal muster.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NAS panel investigates Klamath water shutoff

BY JAMES M. TAYLOR

At the direction of Interior Secretary Gale Norton, the National Academy of Sciences has assembled a panel of 11 scientists to investigate the shutoff of irrigation water to farmers in the Klamath Basin of California and Oregon. On November 6, the panel held public hearings on the issue, and it is expected to release interim findings in early January 2002.

Irrigation water shut off

On April 7, 2001, the federal Bureau of Reclamation decided to allocate nearly all the water in the Klamath Project for the benefit of suckerfish in Upper Klamath Lake, and for coho salmon in the Klamath River. The Bureau determined higher water levels in both bodies of water were necessary for the well-being of the allegedly endangered fish.

Although Klamath farmers rely on lake water to irrigate their crops and feed their livestock, the Bureau ruled the fish's rights to the water trumped those of the farmers, despite the government's prior agreement to supply the farmers with irrigation water.

Since the April 2001 water cutoff, area farmers have staged large protests attracting national attention. Nevertheless, on July 13, 2001, Norton refused to convene a "God squad" of cabinet-level officials with the authority to set aside Bureau decisions enforcing the Endangered Species Act.

Subsequently, a group of farmers announced they had hired property rights specialists Marzulla & Marzulla to present a Fifth Amendment Takings claim in federal court. They acknowledged courtroom litigation may take years to resolve the issue.

> **"We're convinced that we will win if the NAS committee reviews all the science. They will find out that what was done this year has hurt the fish more than it helped them."**
>
> **BOB GASSER, SPOKESPERSON KLAMATH WATER USERS ASSOCIATION**

Federal court throws out ESA determination

The current review by the NAS panel was spurred in part by a September 2001 federal district court decision that a similar population segment of coho salmon must be taken off the endangered species list because the government had significantly undercounted the number of such salmon. According to the court, the government had improperly counted only the number of wild coho salmon, while completely ignoring the thousands of identical fish raised in hatcheries.

Norton has now directed the NAS panel to conduct a "thorough and objective peer review" of the science behind the Reclamation Bureau's decision to shut off the Klamath farmers' irrigation water. The federal court decision regarding the other segment of coho salmon should have a bearing on the NAS investigation.

"There are a lot of questions about the science by people affected by the decision," stated Norton.

The Endangered Species Act (ESA) requires that biological opinions be based on "the best available science." However, "none of the biological opinions were subjected to peer review," noted Bob Gasser, spokesperson for the Klamath Water Users Association. Gasser argued the Bureau of Reclamation ignored substantial peer-reviewed scientific data calling into question the need to shut off Klamath Basin irrigation water, and instead cited only data that supported the outcome it desired.

Farmers concerned about NAS panel

While the farmers welcome an investigation into the issues, many are concerned about the make-up of the NAS panel and its procedures. Gasser pointed out that NAS panel member Dr. Peter Moyle of the University of California at Davis has written a highly opinionated article about some of the issues under investigation for *Defenders of Wildlife* magazine.

"Maybe he can put his personal beliefs aside and be impartial, but it's hard to see how," observed Gasser.

Ric Costales, Pacific Region president of the Frontiers of Freedom, further noted that Moyle authored many of the studies under review by the NAS panel. "He would be reviewing his own studies," observed Costales, who called on Moyle to recuse himself from the panel.

Moreover, Gasser pointed out that the farmers were given very little notice about the November 6 hearings, which prevented them from presenting their two best-qualified scientists to testify regarding the issues.

"The deck is already stacked against us," stated Gasser.

Other methods untried

In addition to the recent federal court decision to delist a similar segment of the coho salmon population, Klamath farmers note other methods could have and should have been utilized to protect the region's fish prior to shutting off the irrigation water.

Senator Gordon Smith (R-Oregon) has observed that the U.S. Fish and Wildlife Service (USFWS) had previously released a plan with a series of recommendations for the recovery of the suckerfish. While prescribing Upper Klamath Lake's minimum level at 4,137 feet above sea level, the plan called for the federal government to actively manage the lake with such programs as water aeration, removal of suckerfish predators, wetland rehabilitation projects, and enhancement of spawning habitats.

After the government failed to act on the plan, it responded to current concerns over the suckerfish by raising the mandatory lake level to 4,140 feet—effectively shutting off the water flow to Klamath Basin farmers.

"The people of the Klamath Basin are having their lives destroyed because a federal agency failed to take its own advice and do its job to recover fish," stated Smith. "Farmers are now being asked to pay for the government's inaction, while the suckerfish may be no better off in the end."

Added Smith, "The Endangered Species Act was never meant to rob people of their livelihoods; it was designed to guide the federal government's management of wildlife recovery efforts. But instead of actively managing as even the Fish and Wildlife Service said it should, it has chosen to blindly throw water at the suckerfish and deprive farm families of that same water without any guarantee of ultimate success."

ESA a tool for other motives?

R.J. Smith, senior environmental scholar for the Competitive Enterprise Institute, asserted that the issue, as far as anti-market environmental groups are concerned, is not so much the protection of fish populations as it is control over the region's current and future land use.

> **"[I]nstead of actively managing as even the Fish and Wildlife Service said it should, it has chosen to blindly throw water at the suckerfish and deprive farm families of that same water without any guarantee of ultimate success."**
>
> **SENATOR GORDON SMITH (R-OREGON)**

According to Smith, the ESA is merely being used as a tool to take control over the region's water rights.

"It's the key to the entire crisis," stated Smith. "Using the ESA to take private property and shred the Bill of Rights, instead of protecting wildlife."

Indeed, Smith noted environmental groups have proposed that the federal government take over the Klamath Basin and turn it into a wildlife preserve.

The NAS panel's interim report will affect water usage in the Klamath Basin in 2002, while a more final, comprehensive report is due by March 30, 2003.

"We are encouraged by the fact that the committee members asked questions about things we didn't expect, such as the effect of ocean conditions on the salmon," said Gasser. "We're convinced that we will win if the NAS committee reviews all the science. They will find out that what was done this year has hurt the fish more than it helped them."

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FOREST continued from page 1

terms of both technical capability of achievement and budgets required for execution." Forest planning was supposed to "engender public trust and bring about consensus," but instead it "produced polarization and increased questioning of the agency's motivations."

Thomas admitted forest plans take longer to write and cost more than originally estimated. By the time they are done, he said, they are obsolete because "new information came to bear faster than the process could absorb it." As a result, no forest plan has been executed as planned.

While the Clinton administration tried to revise the planning rules, Thomas believes those revised rules were also unworkable.

Yet, Thomas sadly observed, most national forests are now in the midst of a new round of planning. He described this as "insanity," which he defined as "doing the same thing over and over and expecting to get a different result."

New processes needed

Thomas suggested three alternatives. First, he proposed, Congress could set up a new Public Land Law Review Commission to examine and recommend changes to the laws under which the Forest Service operates. Second, the administration could review and amend the regulations governing national forest managers. Or, third, national forests could do their planning by emphasizing collaboration.

Bosworth firmly came down on the side of Thomas' second option. The current Forest Services chief said he has no faith Congress could ever significantly revise the laws, and he isn't sure that's needed. New regulations, he hopes, are all the Forest Service needs to get back into business. He has created a task force within the agency to examine regulations.

But as former Chief Thomas pointed out, a "conflict industry" has grown up that wants to keep the existing rules firmly in place. Environmentalists would strongly resist, for example, any proposal to eliminate the agency's appeals process.

"Fierce in battle, many of the eco-warriors have been unable to come to grips with the consequences of victory and are now reduced to wandering about the old battlefields bayoneting the wounded," observed Thomas.

"Their counterparts in the resource extraction community, likewise, cannot come to terms with defeat and hold 'ghost dances' to bring back the good old days when they were undisputed Kings of the West."

Thomas urges the environmentalists, as victors, to develop a "Marshall Plan," recognizing "that the best means of maintaining their gains is by fostering a new spirit of cooperation" through collaborative planning. That means "fostering 'local' or regional solutions to suit local or regional conditions." Thomas doesn't mean only local people should be involved in those solutions, just that one size does not fit all and so each solution should respond to local conditions.

"The fundamental problem . . . is that the current budgeting process gives national forest managers incentives to make the wrong decisions."

For more information...

WWW The agenda, a briefing paper, and testimony delivered at the December 4, 2001 "Gridlock on the National Forests" hearing are available on the Internet at **http://resourcescommittee.house.gov/107cong/forests/2001dec04/agenda.htm.**

Bosworth expressed fear that Thomas' collaborative planning proposal would result in "analysis paralysis about analysis paralysis." He just wants to get things done.

Missing the point

The fundamental problem—which neither Bosworth nor Thomas seems to recognize—is that the current budgeting process gives national forest managers incentives to make the wrong decisions. Thomas observed "the public could not be persuaded that even-aged timber management (i.e., clear-cutting) was an acceptable broad-scale practice" and fretted that people "questioned the agency's motivations."

But outside the Forest Service, many now agree that the Knutson-Vandenberg Act (which allows forest managers to keep timber receipts for reforestation) rewarded clear-cutting more than other forms of cutting, and thus biased the agency to favor a cutting technique the Forest Service itself had once opposed.

In the late 1940s, most national forest managers proclaimed they were proud to use only selection cutting. By the early 1970s, nearly every national forest relied almost exclusively on clear-cutting—much to the consternation of recreationists, biologists, and even, in some places, the timber industry.

Environmentalists used the cumbersome environmental impact statement and forest planning process to offset the budgeting bias in favor of clear-cutting. Because Bosworth's plan to streamline those processes fails to correct the original problem, environmentalists are sure to oppose such streamlining.

Former Chief Thomas says, "When I examine each law in isolation, there is not one with which I would disagree." But in totality they "add up to a disaster as significant land management actions on the federal estate grind to a halt."

What Thomas seems to miss is that he agrees with the purpose of the laws, but not their implementing mechanisms. Simply eliminating those mechanisms, as some propose to do, will likely do little to help the laws achieve their purposes.

Thomas' suggestion of a Public Land Law Review Commission probably will not work: There is simply too much disagreement on what mechanisms can achieve the purposes nearly everyone agrees make sense—protection of biological diversity, maintenance of forest and ecosystem health, and production of those outputs compatible with (or even necessary for) the other goals.

Experimenting with pilot programs

That is why the idea of pilot programs makes a lot of sense.

Pilots such as those proposed by the Forest Options Group (http://www.ti.org/2c.html) would test alternative governance and budgeting systems. The Department of the Interior is considering the use of pilot programs on its lands. The Forest Service should do the same.

When asked about pilots by New Mexico Representative Tom Udall, Bosworth said, "experimenting with different approaches makes a lot of sense. But even if we have some pilot projects we still need to move forward on gridlock" by revising some of the agency's regulations.

Bosworth worries that an emphasis on pilots will leave non-pilot forests in gridlock. But he is willing to try pilots if they can be done at the same time as some rules are revised for all forests.

Randal O'Toole (rot@ti.org) is a senior economist with the Thoreau Institute (http://www.ti.org) and author of the recent book, The Vanishing Automobile and other Urban Myths.

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SMOKE continued from page 12

the regulated community as a whole; and
• any other factor justice may require.

While it is unknown how these new criteria will affect the settlement process, one can reasonably expect that applying all of the statutory criteria to the settlement determination will increase the amount of final settlements.

New roles for court, Attorney General

Senate Bill 471 requires that the plaintiff submit any proposed settlement to the court for approval upon noticed motion, whereas Proposition 65 itself allowed either party to submit the settlement stipulation to the court for approval. The new law also requires that the court make specific findings once a proposed settlement is filed; present practice allowed the court to approve the stipulation for entry of judgment by simple order.

The new law requires that the court's findings include:

(1) that all warnings required by the settlement comply with Proposition 65;

(2) any award of attorneys' fees is reasonable under California law; and

(3) the penalty amount is reasonable based on the statute's criteria for penalty assessment.

The law places the burden on the plaintiff to produce evidence sufficient to sustain the required findings.

Where the private enforcer and defendant seek to settle the case without hearing, the parties will need to provide the court proposed stipulated findings demonstrating that the statutory criteria have been properly structured into the settlement. Otherwise, the court is required to conduct a hearing in order to make the required statutory findings.

"[T]he civil penalty assessment criteria and the requirement for court findings create a burden on those defendants attempting to enter into a straightforward settlement ..."

These new procedures will place additional burdens on defendants seeking to reach settlement with private enforcers. It is unclear how involved the courts will be in reviewing a proposed Proposition 65 settlement.

In addition to providing courts with new responsibilities in reviewing Proposition 65 settlements, the Attorney General is provided the opportunity to appear at and participate in any proceeding on the merits of the settlement without intervening in the case. Again, it remains to be seen what criteria the Attorney General will employ in evaluating the adequacy of proposed settlements and what level of participation his office will choose in a particular case.

Defendants' position little improved

Only time will tell whether the changes to Proposition 65 will have the desired effect of reducing frivolous lawsuits. There is reason to doubt, however, that the impact of the new law will favor defendants.

The non-disclosure provisions of the certificate of merit serve to undercut the effectiveness of what might otherwise be a strong deterrent to litigation abuse. Moreover, the civil penalty assessment criteria and the requirement for court findings create a burden on those defendants attempting to enter into a straightforward settlement under Proposition 65.

Rather than affording defendants protection against unjustified enforcement actions, the Proposition 65 revisions leave defendants in roughly the same position they presently find themselves in . . . with the added concern that whatever they agree to in settlement, may or may not meet with the approval of the Attorney General and the court.

For more information...

WWW A December 2000 report on Proposition 65 prepared by the American Council on Science and Health, ""California's Proposition 65 and Its Impact on Public Health," is available on the ACSH Web site. Point your Web browser to **http://www.acsh.org/press/releases/prop65_120500.html** for the news release, and **http://www.acsh.org/publications/reports/prop65.pdf** for the full text of the 36-page report. A hard copy of the report can be ordered for $5.00 from ACSH, 1995 Broadway, Second Floor, New York, NY 10023.

Dan Hanket is Of Counsel in the Land Use, Environment & Energy Department of the law firm Jeffer, Mangels, Butler & Marmaro LLP. Hanket has worked extensively on various legal matters associated with federal and state Superfund programs, including the negotiation of consent orders and decrees, agency oversight cost demands, and cost allocations.

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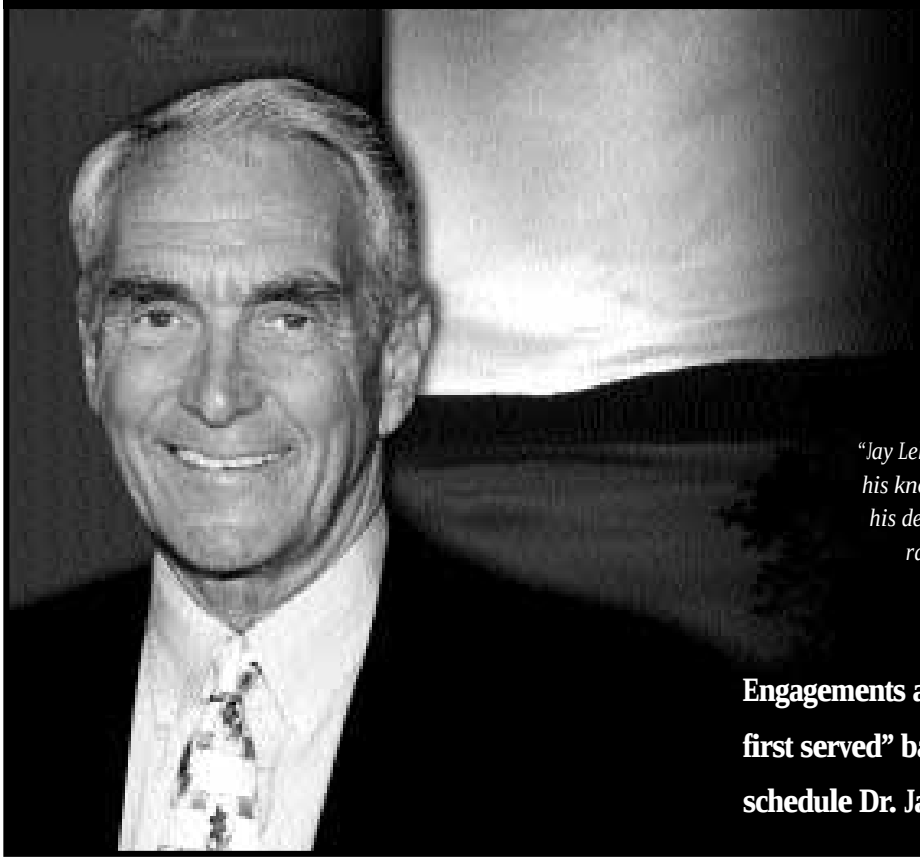

Who is Dr. Jay Lehr?

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SUPERFUND continued from page 1

covered after they sold the land. However, in certain circumstances, such as where the contamination emanates from an underground storage tank at the subject property, prior owners will remain subject to liability under the Superfund law.

Background

The case involves a mobile home park (the "property") owned by the Plaintiff, Carson Harbor Village, Ltd. ("Plaintiff"). Between about 1945 and 1983, Unocal leased the property for petroleum production. From about 1977 through 1983, Carson Harbor Mobile Home Park ("Partnership Defendants") owned the property.

Wetlands occupy a portion of the property, which received storm drainage from several surrounding municipalities. While seeking refinancing for the property in 1993, Plaintiff's lender completed an environmental assessment that revealed slag and tar-like material in the wetlands. Subsequent investigation revealed the material contained petroleum hydrocarbons and lead, and had been present for decades. Soil samples upgradient of the material also contained elevated levels of petroleum substances and lead.

As the lead concentrations exceeded reporting limits, Plaintiff notified the appropriate government agencies, including the Regional Water Quality Control Board ("RWQCB"), of the contamination. The RWQCB assumed the role of lead agency.

While some dispute existed as to whether the RWQCB "ordered" remedial action, Plaintiff admitted its consultant requested a "no further action" letter before proposing a remedial action plan ("RAP"). Apparently, after the RWQCB rejected the request for the letter, Plaintiff's consultant submitted a RAP to remove the tar, slag material, and impacted soils. The RWQCB approved the RAP and set appropriate cleanup levels. The Plaintiff implemented the cleanup in 1995, and the RWQCB subsequently issued a closure letter.

"The key inquiry on whether a cleanup is necessary focuses on objective evidence of a threat to human health or the environment."

After obtaining closure, Plaintiff filed suit under a CERCLA claim and other claims against various entities, including Unocal and the Partnership Defendants, seeking to recover the costs of its remedial action as well as damages arising from its inability to refinance the property.

Under CERCLA, Plaintiff claimed, all of the Defendants were liable for its assessment and cleanup costs. Plaintiff also claimed the Partnership Defendants were liable as owners under CERCLA in that during the time of their ownership of the property, contamination from the tar and slag material spread onto the surrounding soil.

The District Court ruled Plaintiff could not prevail against any of the defendants because it could not establish that the remedial action was "necessary" under the provisions of 42 U.S.C. 9607(a)(4)(B)of CERCLA.

The District Court reasoned that since the RWQCB would not have required remedial action but for Plaintiff's taking the intiative to conduct the cleanup, the costs incurred were not recoverable. The District Court observed CERCLA was not designed to permit property owners to clean up their property voluntarily for business reasons, and then attempt to shift the costs to prior owners.

With respect to Plaintiff's claims against the Partnership Defendants, the District Court found those defendants were not responsible parties under CERCLA since they were not owners or operators of a facility at the time of "disposal" of hazardous substances. The District Court, rejecting the "passive migration theory," defined "disposal" as "active disposal." Since the Partnership Defendants only used the property as a mobile home park, the District Court concluded they were not liable.

Strict compliance with guidelines not necessary

Under the Court of Appeals' October 2001 ruling, landowners who choose to undertake remedial work without an agency directive or order (for example, as a result of a sale or refinance of real property) may seek reimbursement under CERCLA for the costs they incur against prior owners or operators.

The key inquiry on whether a cleanup is necessary focuses on objective evidence of a threat to human health or the environment. Based on this analysis, the lack of an actual agency investigation or cleanup order does not prevent a plaintiff from complying with the National Contingency Plan.

Passive migration does not mandate liability

Further, the appeals court specifically analyzed the issue of whether a prior owner can be liable for "passive" migration of contaminants while it owned the property. According to the Superfund statute, prior owners are liable only if they owned the subject property at the time of "disposal" of hazardous substances. Here, no evidence revealed that active disposal of contaminants occurred during the Partnership Defendants' ownership period.

According to the majority opinion (three judges dissented and argued passive migration should subject prior owners to liability), the possible passive migration of contaminated soil from one part of the property to another, without any active encouragement by the actions of the Partnership Defendants or their knowledge, does not itself create liability.

However, the Court further ruled that, in certain instances, intervening conditions or actions will create liability for prior owners whose direct actions did not cause contamination. For example, someone owning property during a period when hazardous substances may be "passively" leaking from an on-site underground storage tank may be liable under the Superfund law even if the prior owner was not involved in causing or promoting the leaks. Otherwise, the Court noted, owners would have no incentive to inspect and maintain their properties.

Conclusion

While encouraging to past owners of commercial or industrial property, the Court's decision does not completely immunize this group from liability.

First, the *Carson Harbor* court reinforced the Ninth Circuit's relatively lax interpretation of compliance with the Superfund law's cleanup guidelines, the National Contingency Plan. This alone could encourage future CERCLA litigation.

Second, prior landowners, who previously believed they were immune from liability because their activities did not involve active disposal of contaminants, may still incur CERCLA liability if contamination is found to have emanated from their property (such as from an underground tank, clarifier, degreaser, or other industrial improvement) during their ownership period.

These same prior owners may be liable for a "disposal" if neglect or oversight during their ownership period is found to have resulted in contamination. While such parties could conceivably argue CERCLA's "innocent landowner" defense applies to them (they did not know and had no reason to know of contamination at the time of their purchase), this defense can be difficult to prove since the party must establish it exercised appropriate due diligence before acquiring the property. In short, as long as an owner appears in the chain of title and contamination occurred before it purchased the property, it remains susceptible to liability under the "passive" disposal theory because Superfund liability does not require "affirmative human conduct."

"While encouraging to past owners of commercial or industrial property, the Court's decision does not completely immunize this group from liability."

Although Superfund liability may not instill the fear and chilling market effects it caused in the 1980s and much of the '90s, CERCLA issues will remain a major concern in real estate and corporate matters for the foreseeable future.

Kenneth A. Ehrlich is a partner of Jeffer, Mangels, Butler & Marmaro and part of the firm's Land Use, Environment, and Energy Department. Based in the firm's Los Angeles office, the department's practice includes environmental litigation, administrative matters, regulatory compliance, and transaction counseling.

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EDITORIAL

When proselytizing goes too far

BY JAMES M. TAYLOR
MANAGING EDITOR

The other day I decided to take my two daughters, ages one and three, on a nature walk. My girls love animals, and I truly enjoy communing with nature.

On this occasion, rather than visiting my favorite Florida state park, we went on a more structured nature walk. The walk is designed with children in mind, with a guide leading small groups of visitors along a trail of various natural mini-environments interspersed with various hands-on animal stations. The walk is very popular with elementary school field trips, and I trusted my daughters would be similarly excited to see the many plants and animals that make up our environment.

My daughters were fascinated by all the plants and animals. Equally blessed with my daughters' attention was our guide, a young woman who clearly loved nature and who was very happy to share her nature walk with young children.

As our guide pointed out the various plants, turtles, raccoons, armadillos, waterfowl, alligators, and just about everything else that makes its home in Florida, my daughters hung on her every word in unmistakable hero-worship. Truly, I told myself, I chose well to bring my daughters here.

Welcome back to the real world

About midway through our walk, however, I was jolted back into the world of political reality.

While pointing out some mangrove trees, our guide made a truly startling statement. "The reason why we are having a drought in Florida is because too many people have cut down trees to build houses," she said with a straight face. She then gave a sanctimonious speech about how trees "put water into the air at night," and this can't happen anymore now that man is cutting down all the trees.

"Florida is still primarily in its natural state, and even its few major cities harbor uncountable alligators, wetlands, and native species of wildlife. People and nature can and do coexist."

Forget the glaring scientific fiction of our guide's drought rationale. Her argument had clear logical flaws, even if she was ignorant of the science.

Although central Florida has suffered drought conditions during much of the past few years, 2001 was a year of normal rainfall. Did the trees suddenly detach themselves from peoples' homes and replant themselves that January?

Moreover, the drought conditions of the past few years were preceded by an extended period of above-average rainfall. How could we have had such longstanding, above-average rainfall if clearing land for houses prevents rain from falling? Surely, only a small percentage of the state's homes were built after 1997.

As I pondered whether to ask our guide about such obvious logical flaws in her enviro-political assertions, she floored me with another one.

"Worst thing that ever happened"

"The worst thing that ever happened to Florida was the invention of pesticides and air conditioning. Now people enjoy living here."

"Of course," I sarcastically thought to myself, "Florida was such a veritable paradise when malaria ravaged all who came here."

As I watched my girls hanging on our guide's every word, it saddened me very much that they will be taught people are the worst thing to ever happen. People are a part of nature, not nature's opponent.

Eliminating malaria, maintaining homes at something less than 95 degrees and 95 percent humidity, and putting at least a reasonable check on Florida's frog-sized cockroaches aren't the worst things to ever happen to Florida. Florida is still primarily in its natural state, and even its few major cities harbor uncountable alligators, wetlands, and native species of wildlife. People and nature can and do coexist.

I recalled how a similar occurrence affected a good friend of mine.

A free-market environmentalist for a Washington, DC think tank, my friend has a child who is the primary focus of his life. One day, the seven-year-old boy came home from school, handed his father a hand-written note telling him that he was ashamed to have him for a father, and then ran to his bedroom in tears.

As it turned out, his teacher at school had been preaching the same anti-people, anti-free market principles espoused by the guide at my local nature walk. When the teacher learned who the child's father was, she told him it was people like his father who were ruining the world. She then assisted the child in voicing his newfound shame and anger in the form of his hand-written note.

Although I can exercise personal discretion over where I take my children on nature walks, I have little-to-no discretion over my children's public schools.

Will I someday have my daughter come home from school and tell me how ashamed she is to have me as a father? Is it really desirable for elementary school teachers to preach personal politics rather than objective knowledge and moral (rather than political) values?

Is it any wonder so many parents choose to forego free public education and either home-school their children or send them to expensive private schools?

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